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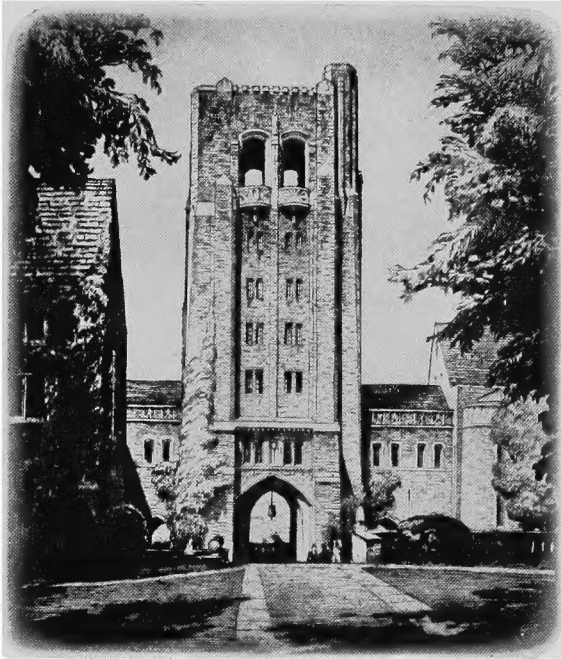
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A TREATISE  
ON THE  
MEASURE OF DAMAGES

OR

AN INQUIRY INTO THE PRINCIPLES WHICH GOVERN  
THE AMOUNT OF PECUNIARY COMPENSATION  
AWARDED BY COURTS OF JUSTICE

BY

THEODORE SEDGWICK

AUTHOR OF "A TREATISE ON STATUTORY AND CONSTITUTIONAL LAW"

*Cum pro eo quod interest dubitationes antiquæ in infinitum productæ sint, melius nobis visum  
est, hujusmodi prolixitatem, prout possibile est, in angustum coarctare.*

*Cod. De sent. quæ pro eo quod int. prof. lib. vii. tit. xlviii*

NINTH EDITION

REVISED, REARRANGED, AND ENLARGED

BY

ARTHUR G. SEDGWICK

AND

JOSEPH H. BEALE

VOL. IV

NEW YORK  
BAKER, VOORHIS & CO.

1912

Edwin P. Gary. 1913.

B 964 (Replacement)

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## CHAPTER LIII

### DAMAGES UNDER THE CIVIL DAMAGE STATUTES

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#### § 1247. Principles on which the statutes rest.

The statutes of many States contain provisions giving damages against the seller of intoxicating liquors for injuries resulting from their sale. Sometimes the act gives the right of action to every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, property, or means of support, against the seller, and also against any person or persons owning or renting, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are sold therein, for all damages sustained; and for exemplary damages; sometimes no action is given against the person owning the premises on which the liquor is sold. The statute in New Hampshire gives the right of action when the liquor has been unlawfully sold;<sup>1</sup> and in Wisconsin only against a person who has been notified, or requested in writing, not to part with liquor to a minor or habitual drunkard.<sup>2</sup> In Michigan it has been said that the intention of the statute is that if there has been an injury which the defendant has contributed to produce, he shall be liable for the whole injury; but that where it appears that the defendant's act in supplying liquor had no appreciable effect in causing the damage, the jury cannot find for the plaintiff.<sup>3</sup> In the same State, a wife suing under the civil damage act cannot show that she

<sup>1</sup> Gen. St. 1878, ch. 109, § 33.

<sup>3</sup> *Steele v. Thompson*, 42 Mich. 594.

<sup>2</sup> Sanborn & Berryman's Annot. Stat. 1889, § 1556.

has children, as, under the statute, each child has a separate action; <sup>4</sup> and this has been held in Iowa also.<sup>5</sup>

In Massachusetts a statute<sup>6</sup> provides that the husband, wife, parent, child, guardian, or employer of any person having the habit of drinking to excess, may have a civil action against any one who sells such person intoxicating liquor after notice not to do so; and may recover "such sum, not less than \$100 nor more than \$500, as may be assessed as damages." The action under this statute is held to be penal, and hence common-law rules as to damages cannot in all respects be applied to it.<sup>7</sup> In Pennsylvania the language of the statute is that "any one aggrieved may recover full damages" for "any injury to person or property." Under this statute it has been held that a father cannot recover money spent for medical service, nursing, etc., in the case of his son, the latter being of full age, and no family relation subsisting.<sup>8</sup> In Illinois also the damages must be for injury to the person, property, or means of support of the plaintiff; <sup>9</sup> and since it is impossible to compute actual damages upon any specific basis, the jury must determine the amount as practical men on the evidence as best they can.<sup>10</sup> In a case in Indiana <sup>11</sup> evidence was offered in mitigation of damages that plaintiff had abused her husband on the street, and had assaulted him; that at another time she went to defendant's saloon and attempted to demolish it with a hatchet; and that during the months when the sales were alleged to have been made to the husband she would go downtown and whip her husband on the way home. But this evidence was held irrelevant.

### § 1248. Where death ensues.

Whether damages can be recovered where death has ensued from the sale of intoxicating liquors has been considered in several cases, and the courts, even in the same State, have

<sup>4</sup> *Rosecrants v. Shoemaker*, 60 Mich. 4, 26 N. W. 794.

<sup>5</sup> *Huggins v. Kavanagh*, 52 Ia. 368, 3 N. W. 409.

<sup>6</sup> R. L. 1902, c. 100, § 53.

<sup>7</sup> *Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736.

<sup>8</sup> *Veon v. Creaton*, 138 Pa. 48, 20 Atl. 865.

<sup>9</sup> *Kellerman v. Arnold*, 71 Ill. 632.

<sup>10</sup> *Brown v. Butler*, 66 Ill. App. 86.

<sup>11</sup> *Gough v. State*, 32 Ind. App. 22, 68 N. E. 1043.



sometimes arrived at opposite conclusions. In *Hayes v. Phelan*,<sup>12</sup> where the plaintiff's husband died from intoxication, it was held in an action against the seller of the liquors that "injured" in the statute meant a legal injury; that the object of the action was to allow a recovery against the remote wrongdoer: to wit, the seller of the liquor, in addition to the action against the immediate wrongdoer, and that there could only be an action against the seller, where an action existed against such a wrongdoer, and that hence there could be none in this case. In *Jackson v. Brookins*,<sup>13</sup> where the plaintiff's husband was killed in an affray while intoxicated, it was held that she could recover damages resulting from the death. In *Quain v. Russell*<sup>14</sup> the same view was adopted; while in *Brookmire v. Monaghan*<sup>15</sup> the opposite view was taken. The Court of Appeals has, however, held, in the case of *Volans v. Owen*,<sup>16</sup> that a new cause of action is given by the statute, and that an action against the seller can be maintained for injury to the means of support, although no other action would lie. The same view has been taken in Illinois;<sup>17</sup> and so, too, in Nebraska.<sup>18</sup> But the rule, that the plaintiff cannot recover damages for the death of her husband arising from the sale of intoxicating liquors, is adopted in a case in Ohio,<sup>19</sup> where the same view of the statute is taken, as in the opinion of the majority of the court in *Hayes v. Phelan*, above cited. McIlvaine, J., in delivering the opinion of the court, says:

"She had an interest in his labor, and in his capacity to labor, as a means of support, during his life; but after his death this means of support no longer existed, and was not the subject of injury or diminution. But to avoid any charge of hypercriticism, we place our decision upon the ground that in view of the previous state of the law, and the mischief sought to be rem-

<sup>12</sup> 4 Hun, 733; but see dissenting opinion in this case of James, J., reported in 5 Hun, 335.

<sup>13</sup> 5 Hun, 530.

<sup>14</sup> 8 Hun, 319.

<sup>15</sup> 15 Hun, 16.

<sup>16</sup> 74 N. Y. 526; *acc.*, *Davis v. Standish*, 26 Hun, 608.

<sup>17</sup> *Emory v. Addis*, 71 Ill. 273.

<sup>18</sup> *Roose v. Perkins*, 9 Neb. 304, 31

Am. Rep. 409, 2 N. W. 715. The fact that property of deceased came to plaintiff at his death does not mitigate the damages. *Houston v. Gran*, 38 Neb. 687, 57 N. W. 403.

<sup>19</sup> *Davis v. Justice*, 31 Oh. St. 359, 27 Am. Rep. 514; *acc.*, *Kirchner v. Myers*, 35 Oh. St. 85, 35 Am. Rep. 589. And see *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485.

edied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term 'means of support,' for an injury to which the right of action is given by the statute."<sup>20</sup>

But see dissenting opinion of Boynton, J., in this case, referred to below. The question is not without difficulty, owing to the absence from the statute of a provision expressly covering injuries resulting from death. It is said, however, with much force, that the statute does not define or enumerate the injuries intended to be covered, but mentions generally injuries to person, property, or means of support in consequence of the intoxication of any person, and that if death ensues as the natural and legitimate result of the intoxication, it is covered by the language of the statute; that if death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded.<sup>21</sup> It is true, that at common law, in actions for wrongs, a recovery could only be had for injuries to person or property. But the question naturally arises, whether the legislative intent of the statute under consideration was not to go beyond the common-law rule, and provide a remedy for injuries produced by intoxication to the means of support of the injured party, whether the injury arose from a temporary cause, such as sickness, or from a permanent cause, such as death. This view is taken by James, J., in the dissenting opinion in *Hayes v. Phelan*, and is very ably maintained by Boynton, J., in the dissenting opinion in *Davis v. Justice*. The learned judge regards the construction given to the statute by the majority of the court as violating both its letter and spirit, and that its provisions clearly indicate a purpose, on the part of the legislature, to require the seller and the owner of the premises, when liable, to make full and adequate compensation in damages to the party injured through their violation of the statute. He says:

"The argument of counsel . . . and the judgment of the

<sup>20</sup> *Davis v. Justice*, 31 Oh. St. 359, 364, 27 Am. Rep. 514.

<sup>21</sup> *Jackson v. Brookins*, 5 Hun, 530; in New York it is not necessary that

the death should have been in the contemplation of the seller; but it is enough if the proximate cause is the selling. *Davis v. Standish*, 26 Hun, 608.

court seem to be founded on the mistaken notion that the action is brought to recover damages for the death of the husband. Such is not the case. The wrongful act which constitutes the ground of the action, is the illegal sale of the liquor, causing the intoxication from which the injury results. The death of the husband only affects the measure of damages. It destroys his ability to labor, and thereby diminishes the wife's means of support. If the husband had lost both his arms or legs, or become permanently insane, in consequence of the intoxication, or had otherwise become permanently disabled to perform physical labor, and had survived, the result to the wife would have been precisely the same. Her injury, in either case, would consist in the deprivation of the means of support resulting from the loss of her husband's ability to labor. There is not the slightest foundation, in reason or justice, for an intention upon the part of the legislature to authorize a recovery for an illegal sale causing intoxication resulting in injury, where death does not follow, and to refuse damages where death results. Indeed, there is much more reason to award damages for the injury in the latter case than in the former. That the legislature intended to authorize a recovery in the one case, and not in the other, is an assumption not only not warranted by, but in clear contravention of the express provisions of the statute." <sup>22</sup>

Where damages for death of a husband caused by the sale of intoxicating liquors were allowed, it was held that the jury might estimate the damages, with reference to the fact that it is the duty of the husband to provide the wife with present support, as well as maintenance for the future, and that she is entitled to such a sum as, in a pecuniary point of view, would make her whole. <sup>23</sup>

#### § 1249. Means of support.

The plaintiff may recover for an injury to her means of support from any cause. <sup>24</sup> The damages are primarily the differ-

<sup>22</sup> *Davis v. Justice*, 31 Oh. St. 359, 369, 27 Am. Rep. 514.

<sup>23</sup> *Rafferty v. Buckman*, 46 Ia. 195. See also *Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409, for a statement of the facts to be considered

in estimating the damages where death has ensued.

<sup>24</sup> *Indiana*: *Nelson v. Hunter*, 32 Ind. App. 88, 69 N. E. 298.

*Michigan*: *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088; *Bowden v.*

ence in the earnings devoted to plaintiff's support,<sup>25</sup> and the plaintiff may therefore show what the means of support were,<sup>26</sup> as for instance a wife may show the occupation and business capacity of her husband.<sup>27</sup> In *Mulford v. Clewell*,<sup>28</sup> the plaintiff's husband was an habitual drunkard. He squandered his own money, sold some of her property, and became unable to work. At times he was wild and delirious, and she was obliged to attend him, and had been put in much fear, and finally compelled to leave the house. It was held that it was not necessary that the plaintiff should have been actually without support, or at any time have been deprived, in whole or in part, of means of support; that means of support relates to the future as well as to the present; that it is enough if she show that the sources of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life, and below what they otherwise would have been. It was also held, that it need not appear that the injury resulted directly and immediately from the drunkenness, during its continuance, but sufficient if it be shown to result from insanity, sickness, or inability produced by intoxication; that to destroy the health of the husband, and his ability to labor, is to destroy her means of support. In *Dunlavey v. Watson* <sup>29</sup> it was held proper for the jury, in awarding damages to the wife, to consider the husband's age, condition in life, and habits of industry, and ability to support his wife, and, in *Wightman v. Devere*,<sup>30</sup> where the plaintiff's husband, while intoxicated, had a fall and was injured so that he was unable to do his work on the farm, and the plaintiff had to hire another

*Voorheis*, 135 Mich. 648, 98 N. W. 406.

*Nebraska*: *Gorey v. Kelly*, 64 Neb. 605, 90 N. W. 554; *Keeling v. Pommer*, 83 Neb. 510, 120 N. W. 155.

*New York*: *Bennett v. Levi*, 19 N. Y. Supp. 226.

*Ohio*: *Schneider v. Hosier*, 21 Oh. St. 98; *Mulford v. Clewell*, 21 Oh. St. 191.

So a wife may show that while her husband was absent drinking she supported herself in part by her own labor, and received aid from the county. *Fox v. Wunderlich*, 64 Ia. 187, 20 N. W. 7.

<sup>25</sup> *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088.

<sup>26</sup> *Illinois*: *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216.

*Michigan*: *Manzer v. Phillips*, 139 Mich. 61, 102 N. W. 292.

<sup>27</sup> *Jackson v. Noble*, 54 Ia. 641, 7 N. W. 88.

<sup>28</sup> 21 Ohio St. 191.

<sup>29</sup> 38 Ia. 398; *acc.*, *Buck v. Maddock*, 167 Ill. 219, 47 N. E. 208.

<sup>30</sup> 33 Wis. 570, 14 Am. Rep. 775.

man to do the work, and had to pay the doctor's bills, it was held that the husband's ability to labor was one of the plaintiff's means of support, and that an injury to this would entitle her to recover; that, also, the physician's bill and the expenses of hiring a man to work, were proper items of claim under the statute. But in *Kellerman v. Arnold*,<sup>31</sup> where the plaintiff's husband had been an habitual drunkard for years before the passage of the act, and when sober could earn \$3 to \$5 a day, but when drunk would spend all his earnings for drink, and had pawned several articles to defendant for drink, it was held, three judges dissenting, that the plaintiff had shown no injury to property, person, or means of support. And in *Meidel v. Anthis*,<sup>32</sup> where the husband supported his family by the cultivation of land, and the evidence showed that the plaintiff spent her time in nursing and taking care of her husband, but there was no evidence of a diminution of the capacity of the husband to labor, it was held that the plaintiff was not entitled to recover. In *Volans v. Owen*,<sup>33</sup> the defendant sold liquor to the plaintiff's son who became intoxicated, was injured, and was confined to his bed for several months. The only evidence of the plaintiff's pecuniary condition was that he owned and cultivated a farm of 100 acres. He was put to medical expense and was deprived of the aid his son usually gave him on the farm. It was held, that there was no evidence of injury to the plaintiff's means of support. The court said:

"Where injury to 'means of support' is the gravamen of the action, the plaintiff, in order to maintain the action, must show that, by or in consequence of the intoxication or the acts of the intoxicated person, his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence, by being deprived of the support which he had before enjoyed; and, in this case, the plaintiff cannot recover for loss of service or the expenses of his son's illness, under the words 'means of support,' without proof that the services were necessary to his support, or that the charge brought upon him, by his son's illness, diminished his means,

<sup>31</sup> 71 Ill. 632.

<sup>32</sup> 71 Ill. 241.

<sup>33</sup> 74 N. Y. 526, 530, 30 Am. Rep.

337. For construction of term "means of support" in the statute, see, also, *Schneider v. Hosier*, 21 Oh. St. 98.

so as to render them inadequate therefor. The primary purpose of the legislature, in giving a right of action for an injury of this character, was the protection of the dependent and helpless. Diminution of income, or loss of property, does not constitute an injury to means of support, within the fair intendment of the statute, if the plaintiff, notwithstanding, has adequate means of maintenance, from accumulated capital or property, or his remaining income is sufficient for his support."

In *Weitz v. Ewen* <sup>34</sup> it was held that the jury might consider what the earnings of the husband would have been if sober. In *Sharpley v. Brown* <sup>35</sup> it was held that the remarriage of the plaintiff might be shown as bearing on the means of support. Generally speaking, these statutes are for the benefit of married women and children. In Michigan, where a father voluntarily assumed the support of an adult son, as a poor person (under a statute), it was held that he might recover under the civil damage act, for his outlay in necessary support, based on the probabilities of life of his son and himself.<sup>36</sup> Where the gist of the action is injury to the means of support, evidence is usually admissible as to the amount necessary for such support under ordinary circumstances.<sup>37</sup> In such actions the fact that the plaintiff was previously a sober and industrious man, and afterwards became idle and neglected his work, is proper for the consideration of the jury.<sup>38</sup> Where the action is simply for the injury to the wife's means of support, it is error to allow evidence as to the number of children.<sup>39</sup>

The probable length of life of the deceased may be shown.<sup>40</sup> Generally speaking, in these actions resort may be had to the tables in common use, showing the expectation of life.<sup>41</sup> In Michigan it has been held that although plaintiff's husband had been a drunkard for ten years and contributed nothing

<sup>34</sup> 50 Ia. 34.

<sup>35</sup> 43 Hun, 374.

<sup>36</sup> *Clinton v. Laning*, 61 Mich. 355, 28 N. W. 125.

<sup>37</sup> *Illinois: McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1026.

*Iowa: Thill v. Pohlman*, 76 Ia. 638, 41 N. W. 385.

*Nebraska: Warrick v. Rounds*, 17 Neb. 411.

<sup>38</sup> *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

<sup>39</sup> *Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488; *Johnson v. Schultz*, 74 Mich. 75, 41 N. W. 865.

<sup>40</sup> *Betting v. Hobbett*, 142 Ill. 72, 30 N. E. 1048.

<sup>41</sup> *Sellars v. Foster*, 27 Neb. 118.

to her support, still she is entitled at least to the amount of his earnings spent in liquor.<sup>42</sup> Plaintiff is however not entitled to all the earnings her husband would have made if the defendant had not sold him liquor. She is entitled only to what she would have received, so far as was suitable to her station and situation in life.<sup>43</sup> If by reason of the husband's wealth or otherwise his wife is provided with reasonable support, she cannot recover for loss of support simply because he neglects his business or earns less money and so is not possessed of as large means as he otherwise would be.<sup>44</sup>

### § 1249a. Injury to property.

Where the compensation is for injury to property, prospective damages are allowed, and include expenses of medicines and medical attendance, the necessity of doing additional labor, and almost every species of pecuniary damage.<sup>45</sup>

### § 1250. Other damages.

The cases in which damages are given for injuries other than to means of support consequent upon the intoxication of the person doing the injury, illustrate the general rule that the measure of damages depends upon the extent of the injury. Thus, in *Bertholf v. O'Reilly*,<sup>46</sup> the son of the plaintiff, on a Sunday, took the plaintiff's horse, saying that he was going to see a friend, but instead went directly to the defendant's place and became intoxicated there, and, being in such a state, drove the horse so violently that it died. It was held that he could recover the value of the horse. In *Morenus v. Crawford*<sup>47</sup> it was held that plaintiff, a married woman, could recover, under the civil damage act, for a horse belonging to her, killed by her husband while intoxicated. In *Aldrick v. Sager*,<sup>48</sup> where the defendant sold liquor to the son-in-law of the plaintiff, who be-

<sup>42</sup> *Rouse v. Melsheimer*, 82 Mich. 172.

<sup>43</sup> *McNetton v. Herb*, 158 Mich. 525, 123 N. W. 17.

<sup>44</sup> *Confrey v. Stark*, 73 Ill. 187.

<sup>45</sup> *Illinois*: *McEvoy v. Humphrey*, 77 Ill. 388 (see *Coleman v. People*, 78 Ill. App. 210).

*Michigan*: *Thomas v. Dansby*, 74 Mich. 398, 41 N. W. 1088.

*Nebraska*: *Keeling v. Pommer*, 83 Neb. 510, 120 N. W. 155.

*Wisconsin*: *Wightman v. Devere*, 33 Wis. 570.

<sup>46</sup> 8 Hun, 16; aff'd 74 N. Y. 509, 3 Am. Rep. 323.

<sup>47</sup> 51 Hun, 89.

<sup>48</sup> 9 Hun, 537.

came intoxicated thereby, and in consequence thereof drove a team behind which he and the plaintiff's wife were riding, so recklessly as to upset the wagon and break the wife's arm, it was held that the husband was entitled to recover for the loss of her service and the expense of medical attendance. In *Kilburn v. Coe*,<sup>49</sup> where the plaintiff's intestate was an habitual drunkard, and the defendant sold him liquor, it was held that an action could be maintained to recover money paid for the liquor, as one of the consequences of the sale was to deprive the purchaser of the price paid. In *Peterson v. Knoble*,<sup>50</sup> where plaintiff's husband became intoxicated from liquor sold by the defendant, and by threatening and frightening the plaintiff, compelled her to leave the house and remain away until he became sober, it was held that turning the plaintiff out of doors was an injury for which an action could be maintained by her.

The plaintiff may recover compensation for the subsequent thriftless career of the victim, and his becoming an habitual drunkard, and being unable to obtain employment;<sup>51</sup> and the costs and expenses of actions, both civil and criminal, brought against the victim in consequence of his drinking may also be recovered.<sup>52</sup>

### § 1251. Sales by several persons.

The question of the liability, under the statute, of several persons for the result of injuries done by a person intoxicated on liquor purchased from them, has also come before the courts, and, in *Boyd v. Watt*,<sup>53</sup> where the plaintiff's husband was a practicing physician, and became an habitual drunkard, and died from the effects: it was held, that the defendant was only liable for his own illegal acts, but that this was an action for damages on account of habitual intoxication, not

<sup>49</sup> 48 How. Pr. 144. But see *McNetton v. Herb*, 158 Mich. 525, 123 N. W. 17.

<sup>50</sup> 35 Wis. 80.

<sup>51</sup> *Kansas*: *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

*Nebraska*: *Stahnka v. Kreitle*, 66 Neb. 829, 92 N. W. 1042.

It has, however, been held that the trouble and discomfort the intoxicated person afterwards found in doing his work is not cause for compensation. *Borgasen v. Eklund*, 96 Ill. App. 443.

<sup>52</sup> *Wesnieski v. Vanek* (Neb.), 99 N. W. 258.

<sup>53</sup> 27 Oh. St. 259.



for special cases of intoxication. That if defendant's course was one which tended to produce this, he was liable for all damages, although others may have contributed. That he was one of the joint tort-feasors, and the fact that no conspiracy or agreement existed between the tort-feasors did not make any difference; each was liable for all damages. In *Woolheather v. Risley* <sup>54</sup> it was held that the fact that defendant was aided by others in committing a wrong, and did not do it solely, would not relieve him from the consequences of that wrong, if he contributed to the intoxication. In *Jewett v. Wanshura*, <sup>55</sup> where several persons had sold intoxicating liquors to the husband, a settlement by the wife with one of them, it was held, did not operate to discharge the others from liability; but, in *Morenus v. Crawford*, <sup>56</sup> where the plaintiff brought an action against the defendants to recover the value of a horse belonging to her separate estate, which was killed by her husband while intoxicated on liquors purchased from the defendants, it was held that no recovery could be had on evidence of separate sales.

On the other hand, in Iowa, it seems to be now settled that where there are a series of sales a joint action will not lie, and the defendant is not liable for damages to which he did not contribute.<sup>57</sup> In Massachusetts it has been held that, in an action for causing intoxication, the defendant is liable for any results of intoxication, although the liquor sold by the defendant contributed only in part to the intoxication; but he is not liable for the formation of habits of intoxication where other parties sold liquor.<sup>58</sup> The present Nebraska statute makes every one who contributes to the intoxication liable.<sup>59</sup> Under

<sup>54</sup> 38 Ia. 486.

<sup>55</sup> 43 Ia. 574.

<sup>56</sup> 15 Hun, 45.

<sup>57</sup> *Huggins v. Kavanagh*, 52 Ia. 368; *Jackson v. Noble*, 54 Ia. 641; *acc.*, *Kirchner v. Myers*, 35 Oh. St. 85, 35 Am. Rep. 598; *Ennis v. Shiley*, 47 Ia. 552; *Engleken v. Webber*, 47 Ia. 558; *Kearney v. Fitzgerald*, 43 Ia. 580; *Hitchner v. Ehlers*, 44 Ia. 40; *La France v. Krayner*, 42 Ia. 143; *Flint v. Gauer*, 66 Ia. 696; *Richmond v. Shickler*, 57

Ia. 486. Where, however, the suit is based on a single intoxication, all who contributed to it are liable. *Faivre v. Manderschied*, 117 Ia. 724, 90 N. W. 76.

<sup>58</sup> *Bryant v. Tidgewell*, 133 Mass. 86.

<sup>59</sup> *Kerkow v. Bauer*, 15 Neb. 150; *Elshire v. Schuyler*, 15 Neb. 561; *Jones v. Bates*, 26 Neb. 693, 42 N. W. 753. But the fact that the husband drank to excess in other saloons before defendant sold him liquor may be shown to

the Kansas statute each seller is responsible.<sup>60</sup> Where a sale of liquor throws a man back into habits of intoxication which he had abandoned the plaintiff may recover for the consequent loss of support.<sup>61</sup>

### § 1252. Acquiescence a bar.

Acquiescence by the persons seeking to recover in the obtaining of liquor for the person doing the injury, or in uniting with him in drinking, or permitting him to drink, when the party bringing the action might have interposed and prevented, are held sufficient to bar a recovery under the statute.<sup>62</sup> Thus, in *Engleken v. Hilger*<sup>63</sup> it was held that the wife could not recover damages from the seller of intoxicating liquors for injuries committed by her husband upon herself, while he was intoxicated, if she has contributed to his intoxication by purchasing the liquor, or joining with him in drinking it. In *Reget v. Bell*,<sup>64</sup> the plaintiff's husband, who was a hard-working man, subject to occasional fits of intemperance, but who treated her kindly at all times, bought a jug of whiskey and put it by his bedside one night, and in the morning it was nearly all gone. He died from the effects of the liquor; and it was held that, from the testimony, it was plain that the plaintiff could have taken the whiskey away from her husband; and, from the evidence as to character, it would not do for her to say she was afraid, but she must be considered to have been a willing party to her husband's conduct, and, therefore, could not recover. But where the acquiescence of the wife is attended with circumstances which justify the conclusion that she acted under the coercion of her husband, her acquiescence in the sale of the liquor to him will be no defence. Thus, in *Jewett v. Wanshura*,<sup>65</sup> where the plaintiff forbade the defendant to sell liquor to her husband, but a day or two thereafter the plaintiff and

affect the amount of recovery. *Uldrich v. Gilmore*, 35 Neb. 288, 53 N. W. 135.

<sup>60</sup> *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

<sup>61</sup> *Selders v. Brothers*, 88 Neb. 61, 129 N. W. 170.

<sup>62</sup> *Elliott v. Barry*, 34 Hun. 129. In *Cramer v. Danielson*, 99 Mich. 531,

58 N. W. 476, evidence that plaintiff had herself furnished her husband with liquor was allowed in mitigation.

<sup>63</sup> 43 Ia. 563; *acc.*, *McDonald v. Casey*, 84 Mich. 505, 47 N. W. 1104 (*semble*).

<sup>64</sup> 77 Ill. 593. See, also, *Kearney v. Fitzgerald*, 43 Ia. 580.

<sup>65</sup> 43 Ia. 574.

her husband went to the defendant's saloon, and countermanded her previous order, and the plaintiff proved that she was compelled to retract her order by the threats of her husband that he would abandon her and take her child from her; although knowledge of these threats was not brought home to the defendant, it was held that there was a reasonable inference to be drawn from the conduct of the plaintiff, that she acted under restraint, and that the defendant was therefore liable. The act of a married woman in signing a petition for defendant's license as a seller does not operate as a bar; it is no acquiescence in his subsequently injuring her by a violation of the act.<sup>66</sup>

### § 1253. Avoidable consequences.

As acquiescence is a bar, so no doubt the rule of avoidable consequences applies. The remarks of the Supreme Court of Nebraska, in *Warrick v. Rounds*,<sup>67</sup> on this subject only go to show that the rule was not applicable under the circumstances under consideration.

### § 1254. Exemplary damages.

Exemplary damages may be recovered under the statute;<sup>68</sup> but, as in all cases, they can only be recovered where actual damages are sustained.<sup>69</sup> And where the defendant's servant,

<sup>66</sup> *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625.

<sup>67</sup> 17 Neb. 411.

<sup>68</sup> *Illinois*: *Lowry v. Coster*, 91 Ill. 182; *Wolfe v. Johnson*, 152 Ill. 280, 38 N. E. 886; *Beckerle v. Brandon*, 229 Ill. 180, 82 N. E. 283, affirming 133 Ill. App. 114.

*Maine*: *Campbell v. Harmon*, 96 Me. 87, 51 Atl. 801.

*Michigan*: *Theisen v. Johns*, 72 Mich. 285, 40 N. W. 727.

*Ohio*: *Bean v. Green*, 33 Oh. St. 444.

*West Virginia*: *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58 (overruling *Pegram v. Stortz*, 31 W. Va. 220, 6 S. E. 485); *McMaster v. Dyer*, 44 W. Va. 644, 29 S. E. 1016.

*Ante*, § 377a.

In *Nebraska*, in accordance with the doctrine there held, exemplary damages are not allowed without express statutory provision to that effect. *Roose v. Perkins*, 9 Neb. 304, 2 N. W. 715, 31 Am. Rep. 409.

In *Michigan* the term exemplary damages means increased damages on account of mental suffering. *Boydan v. Haberstumpf*, 129 Mich. 137, 88 N. W. 386.

<sup>69</sup> *Illinois*: *Freese v. Tripp*, 70 Ill. 496; *McEvoy v. Humphrey*, 77 Ill. 388; *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027; *Kennedy v. Sullivan*, 136 Ill. 94, 26 N. E. 382; *Meidel v. Anthis*, 71 Ill. 241; *Fentz v. Meadows*, 72 Ill.

in disobedience of his master's order, sold liquor to the plaintiff's husband, who became intoxicated, and thereby the plaintiff was injured in her means of support, it was held that the court below should have instructed the jury that exemplary damages could not be awarded, unless the act of giving or selling intoxicating liquor to the husband of the plaintiff was wilful.<sup>70</sup> To the same effect see *Ganssly v. Perkins*.<sup>71</sup> It is also held that the defendant can show, in mitigation of exemplary damages, that the liquor was sold by his servant in disobedience of his order.<sup>72</sup>

In New York, where the statute expressly allows exemplary damages, the fact that the defendant was selling liquor without a license may be considered as a basis for exemplary damages.<sup>73</sup> The ordinary common-law rules govern the allowance of exemplary damages, and malice or some bad motive or evil intent or gross negligence, must be shown.<sup>74</sup> In *Secor v. Taylor*,<sup>75</sup> the court says that if half a dozen actions are brought for the single act of permitting lessees to sell, the defendant should at least be entitled to have any prior judgments for exemplary damages brought before the jury, in order that they may know how much punishment has already been inflicted. In *Ketcham v. Fox*<sup>76</sup> it was held that a lessor, in the absence of any evidence to show that he had knowledge of the circumstances under

540; *Graham v. Fulford*, 73 Ill. 596; *Albrecht v. Walker*, 73 Ill. 69; *Neu v. McKechnie*, 95 Ill. 632.

*Iowa*: *Weitz v. Ewen*, 50 Ia. 34; *Fox v. Wunderlich*, 64 Ia. 187, 20 N. W. 7. Causing the plaintiff's husband to use threatening language, etc., is not a ground for exemplary damages. *Calloway v. Laydon*, 47 Ia. 456, 29 Am. Rep. 489.

*Maine*: *Gilmore v. Mathews*, 67 Me. 517.

*Michigan*: *Ganssly v. Perkins*, 30 Mich. 492; *Rouse v. Melsheimer*, 82 Mich. 172, 46 N. W. 372; *Rosecrants v. Shoemaker*, 60 Mich. 4.

*New York*: *Mead v. Stratton*, 87 N. Y. 493, 41 Am. Rep. 386.

<sup>70</sup> *Kreiter v. Nichols*, 28 Mich. 496.

<sup>71</sup> 30 Mich. 492.

<sup>72</sup> *Fentz v. Meadows*, 72 Ill. 540; *Freeze v. Tripp*, 70 Ill. 496. In *Nebraska* it is held that no exemplary damages can be given. *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409.

<sup>73</sup> *Davis v. Standish*, 26 Hun, 608.

<sup>74</sup> *Illinois*: *Kellerman v. Arnold*, 71 Ill. 632; *Kadgin v. Miller*, 13 Ill. App. 474.

*Michigan*: *Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488.

*New York*: *Reid v. Terwilliger*, 116 N. Y. 530, 22 N. E. 1091; *Rawlins v. Vidvard*, 34 Hun, 205.

*Wisconsin*: *Wightman v. Devere*, 33 Wis. 570.

<sup>75</sup> 41 Hun, 123; *cf. Reid v. Terwilliger*, 42 Hun, 310.

<sup>76</sup> 52 Hun, 284.

which the liquor was sold, was not liable in exemplary damages. It is held in Iowa that exemplary damages may be recovered wherever there has been a wilful violation of the statute.<sup>77</sup>

Exemplary damages are awarded on account of the misconduct of the defendant. Hence, where the evidence showed that the plaintiff notified defendant not to sell any more liquor to her husband, he being an habitual drunkard, and his habits being necessarily known to defendant, it was held that the case came within the rule.<sup>78</sup> On the other hand, it is erroneous to require the jury to find exemplary damages if they find actual damages. This is for the jury to determine under proper instructions.<sup>79</sup> In Indiana, where the act is punishable criminally, exemplary damages are not allowed.<sup>80</sup>

In an action on a liquor-dealer's bond, since the action sounds in contract, exemplary damages cannot be recovered.<sup>81</sup>

### § 1255. Consequential damages.

The question what damages are remote from the wrongful sale of liquor, in an action upon the Civil Damage Act, is a question which is not always decided as strictly as at common-law. The court often allows recovery for injuries which in ordinary cases would be regarded as remote; though of course if no connection whatever can be shown between the intoxication and the injury a recovery will not be allowed.<sup>82</sup> Thus, in a case in Illinois, where an habitual drunkard was killed while in a state of intoxication, and his wife brought a joint action

<sup>77</sup> *Fox v. Wunderlich*, 64 Ia. 187, 20 N. W. 7; *Miller v. Hammers*, 93 Ia. 746, 61 N. W. 1087.

So in *Ohio*: *Schneider v. Hosier*, 21 Oh. St. 98.

<sup>78</sup> *Jockers v. Borgman*, 29 Kan. 109, 44 Am. Rep. 625. In Michigan, it seems, a mere notice not to sell is enough. *Larzelere v. Kirchgessner*, 73 Mich. 276, 41 N. W. 488; *Rouse v. Melsheimer*, 82 Mich. 172, 46 N. W. 372.

<sup>79</sup> *Illinois*: *Tetzner v. Naughton*, 12 Ill. App. 148; *Schimmelfenig v. Donovan*, 13 Ill. App. 47.

But see *Iowa*: *Thill v. Pohlman*, 76 Ia. 638, 41 N. W. 385.

<sup>80</sup> *Schafer v. Smith*, 63 Ind. 226; *Koerner v. Oberly*, 56 Ind. 284, 26 Am. Rep. 34.

<sup>81</sup> *Illinois*: *Cobb v. People*, 84 Ill. 511.

*Iowa*: *Richmond v. Shickler*, 57 Ia. 486, 10 N. W. 882.

*South Dakota*: *Garrigan v. Thompson*, 17 S. D. 132, 95 N. W. 294.

*Ante*, § 683.

<sup>82</sup> *Illinois*: *McMahon v. Sankey*, 133 Ill. 636, 24 N. E. 1027.

*Indiana*: *Mulcahey v. Givens*, 115 Ind. 286.

*Michigan*: *Steele v. Thompson*, 42 Mich. 594.

against certain persons who sold him liquor on the day of his death, and others who were charged with causing the habit of intoxication, it was held that the latter could not be charged, the sales on the day of his death being an intervening cause.<sup>83</sup>

Where the intoxication causes illness or insanity, the defendant is liable for it;<sup>84</sup> thus illness caused by exposure to the elements as a result of the intoxication is chargeable to the defendant.<sup>85</sup> On the other hand, it has been held that where money was taken by thieves from the drunkard while he was helpless from intoxication it could not be recovered from the defendant.<sup>86</sup>

Where the person who has become intoxicated on liquor furnished by defendant starts home in a vehicle and because of his intoxication he falls out of the wagon<sup>87</sup> or his horse runs away,<sup>88</sup> the defendant is liable for the resulting injury. But where the intoxicated person lay down in bottom of his wagon going home and a barrel rolled on him and killed him, it was held too remote.<sup>89</sup> So if, while on his way home, the intoxicated person is drowned by a freshet<sup>90</sup> or run over by a train<sup>91</sup> the defendant has been held responsible. Where after being made drunk by the defendant, he made an attack upon a neighbor's house, and was killed, this result was held too remote for compensation.<sup>92</sup> When he made an assault, this was held remote;<sup>93</sup> and *a fortiori* his imprisonment, as a result of such assault has been held remote.<sup>94</sup> But in a New York case, the plaintiff alleged that her husband had been made intoxicated through

<sup>83</sup> Tetzner v. Naughton, 12 Ill. App. 148; cf. Murphy v. Curran, 24 Ill. App. 475.

<sup>84</sup> Mulford v. Clewell, 21 Oh. St. 191.

<sup>85</sup> Nelson v. Hunter, 32 Ind. App. 88, 69 N. E. 298.

<sup>86</sup> Gage v. Harvey, 66 Ark. 68, 48 S. W. 898.

<sup>87</sup> Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386.

<sup>88</sup> Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42; Mulcahey v. Givens, 115 Ind. 286, 17 N. E. 598.

<sup>89</sup> Krach v. Heilman, 53 Ind. 517.

<sup>90</sup> Hackett v. Smelsley, 77 Ill. 109.

<sup>91</sup> Illinois: Schroder v. Crawford, 94 Ill. 357, 34 Am. Rep. 236.

Massachusetts: McNary v. Blackburn, 180 Mass. 141, 61 N. E. 885.

Contra, Indiana: Collier v. Early, 54 Ind. 559.

<sup>92</sup> Schmidt v. Mitchell, 84 Ill. 195, 25 Am. Rep. 446. And so where he was injured in an assault upon a third party. Currier v. McKee, 99 Me. 364, 59 Atl. 442.

<sup>93</sup> Swinfin v. Lowry, 37 Minn. 345, 34 N. W. 22; contra, where the assault was on the wife. Minot v. Doherty, 203 Mass. 37, 89 N. E. 188.

<sup>94</sup> Bradford v. Boley, 167 Pa. 506,

the defendant's selling to him; that while so intoxicated he shot and killed one B, and was thereupon tried and convicted, and sent to prison for life. Under these circumstances it was held that his wife could recover for deprivation of means of support.<sup>95</sup>

The deceased, having become intoxicated, got into a quarrel, went with his opponent for some distance into a vacant lot and there fought him, and while they were fighting, somebody shouted "police," whereupon the drunken man ran away into another lot and there fell into a hole and was killed. It was held that this was not the proximate consequence of the sale of liquor. If he had injured himself while going home along the highway or had been run over by a train on his way home, or if he had been injured by a person whom he had assaulted, that might be proximate, but this was not.<sup>96</sup>

On the other hand, where as a result of drinking the drinker committed suicide, this was held proximate to the sale.<sup>97</sup> And in an extreme case where the plaintiff's husband while intoxicated sold her personal property she was allowed to recover its value.<sup>98</sup> But where plaintiff was following her husband to see where he obtained his liquor and as he came out of defendant's saloon in order to get out of his sight she hurried and slipped on the sidewalk and was injured, it was held not the proximate consequence of her husband's intoxication.<sup>99</sup> But where the defendant, in violation of a statute, sold liquor to a slave, who died of drunkenness and exposure, the jury held the death to be the natural result of the defendant's act, and he was therefore obliged to give compensation for it.<sup>100</sup>

31 Atl. 751. Or where he was imprisoned for burglary committed while intoxicated. *Dennison v. Van Wormer*, 107 Mich. 461, 65 N. W. 274.

<sup>95</sup> *Beers v. Walhizer*, 43 Hun, 254; *acc.*, *Homire v. Halfman*, 156 Ind. 470, 60 N. E. 154.

<sup>96</sup> *Roach v. Kelly*, 194 Pa. 24, 44 Atl. 1090, 75 Am. St. Rep. 685.

<sup>97</sup> *Iowa*: *Bistline v. Ney*, 134 Ia. 172, 111 N. W. 422, 13 L. R. A. (N. S.) 1158.

*New York*: *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89 (killed his

wife while drunk and committed suicide).

*South Dakota*: *Garrigan v. Kennedy*, 19 S. Dak. 11, 101 N. W. 1081 (committed suicide after becoming sober).

<sup>98</sup> *Mulford v. Clewell*, 21 Oh. St. 191. So where the intoxication deprived the drunkard's son of school books. *Strattman v. Moore*, 134 Ill. App. 275.

<sup>99</sup> *Johnson v. Drummond*, 16 Ill. App. 641.

<sup>100</sup> *Harrison v. Berkeley*, 1 Strobb. (S. C.) L. 525, 47 Am. Dec. 578.

The attempt has been made in Georgia, which has no civil damage statute, to apply the principle of these acts to the statute allowing a recovery for death caused by crime, or "criminal or other negligence." But the court not being able to find the necessary causal connection between the act of furnishing to a third person, and the death of the plaintiff, refused to hold the defendant liable.<sup>101</sup> In New York it seems to be settled that when death ensues, the question is not whether the death was the natural, reasonable, or probable consequence of defendant's act, but it was enough if intoxication, caused in whole or in part by liquors sold by the defendant, was the cause of the death, if by reason thereof plaintiff's means of support were injuriously affected.<sup>102</sup>

### § 1256. Mental suffering.

It is clearly settled that mental suffering is not a ground for the recovery of damages, under the statute, where by its terms the recovery is confined to cases of injury to person or property.<sup>103</sup> But the statute may be broader than this. Thus, in Michigan, it covers any injury, and accordingly in that State it has been held that it would be a "mockery of justice" to exclude evidence of mental anguish, disgrace, and loss of society and companionship in the case of a married woman;<sup>104</sup> but this is confined to shame, mortification, and grief arising from the intoxication itself and not grief from an injury received by the intoxicated person.<sup>105</sup>

<sup>101</sup> *Belding v. Johnson*, 86 Ga. 177, 12 S. E. 304.

<sup>102</sup> *New York*: *Beers v. Walhizer*, 43 Hun, 254; *Blatz v. Rohrbach*, 42 Hun, 402; *Volans v. Owen*, 74 N. Y. 529, 30 Am. Rep. 337; *Mead v. Stratton*, 87 N. Y. 496, 41 Am. Rep. 386; *Neu v. McKechnie*, 95 N. Y. 636; *McCarty v. Wells*, 51 Hun, 172; s. c. 4 N. Y. Supp. 672.

<sup>103</sup> *Illinois*: *Freeze v. Tripp*, 70 Ill. 496; *Meidel v. Anthis*, 71 Ill. 241; *Brantigan v. While*, 73 Ill. 561.

*Indiana*: *Koerner v. Oberly*, 56 Ind. 284.

*Iowa*: *Kearney v. Fitzgerald*, 43 Ia. 580; *Calloway v. Laydon*, 47 Ia. 456, 29 Am. Rep. 489; *Jackson v. Noble*, 54 Ia. 641, 7 N. W. 88.

*Ohio*: *Mulford v. Clewell*, 21 Oh. St. 191.

<sup>104</sup> *Friend v. Dunks*, 37 Mich. 25; *Johnson v. Schultz*, 74 Mich. 75, 41 N. W. 865; *Radley v. Seider*, 99 Mich. 431, 58 N. W. 366; *Lucker v. Liske*, 111 Mich. 683, 70 N. W. 421. See *Clinton v. Laning*, 61 Mich. 355, 28 N. W. 125.

<sup>105</sup> *Sissing v. Beach*, 99 Mich. 439, 58 N. W. 364.



## CHAPTER LIV

### DAMAGES IN EQUITY

- |   |   |
|---|---|
| § 1256a. Allowance of damages by a court of equity.               | § 1256f. Damages granted for the protection of the defendant. |
| 1256b. Power of English court of equity to award damages.         | 1256g. Taking of an account.                                  |
| 1256c. Damages as incidental relief.                              | 1256h. Damages against a trustee for breach of trust.         |
| 1256d. Damages on failure to obtain equitable relief.             | 1256i. Time to which damages are assessed.                    |
| 1256e. No damages where plaintiff should not have sued in equity. | 1256j. Damages assessed on legal principles.                  |
|   | 1256k. Interest.  |

#### § 1256a. Allowance of damages by a court of equity.

A court of equity will not in general grant relief by the allowance of damages. It is a general principle of the equity jurisdiction that it will not be afforded when there is an adequate remedy at law, and as a court of law is peculiarly competent to give a judgment for money damages, it is very seldom the case that a court of equity can be called upon to grant pecuniary compensation. The fact that in equity relief is administered without trial by jury, makes it peculiarly important that its jurisdiction should not be extended and that wherever a court of law has complete power to do justice, the court of equity should not by its interference deprive the defendant of the benefit of jury trial.<sup>1</sup> Where, as is now often the case, the same court administers both legal and equitable relief, this argument has become less important, as it is always in the power of the court to have the issue tried by jury even though it arises in the course of a suit asking for equitable relief.<sup>2</sup>

#### § 1256b. Power of English court of equity to award damages.

While the granting of damages in equity is not commonly

<sup>1</sup> *Woodman v. Freeman*, 25 Me. 531. Co.,<sup>56</sup> App. Div. 9, 67 N. Y. Supp.

<sup>2</sup> See *McNulty v. Mt. Morris E. L.* 395.

provided, it is nevertheless entirely within the power of the court to administer relief in this form. As early as the reign of Richard II., the chancellor was given power by statute to award damages in his discretion.<sup>3</sup> Modern legislation in England<sup>4</sup> provides that in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any contract, covenant, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any contract, covenant, or agreement, it shall be lawful for the same court, if it think fit, to award damages to the party injured, either in addition to or substitution for such injunction or specific performance, and that such damages may be assessed by a jury, or before the court itself, as it shall think fit.<sup>5</sup> But under this act, it was held by Wood, V. C., that the court will not award damages in addition to a decree for specific performance where it does not appear that the plaintiff has sustained any special injury.<sup>6</sup> Nor, after making a decree for specific performance, can it add an order assessing damages for the breach of the covenant.<sup>7</sup> Nor can it award the damages unless there is an agreement capable of being specifically performed.<sup>8</sup> In cases where, under this statute, the court, instead of granting an injunction against interference with the complainant's right, may give compensation, the compensation is given once for all; it cannot be given, as in an action at law, *toties quoties*.<sup>9</sup> It is questionable whether, even under the codes of practice in the American States, comprehensive as they are, such a jurisdiction could be exercised as that conferred by this English legislation,<sup>10</sup> which was continued and even increased under the Judicature Act.<sup>11</sup>

<sup>3</sup> 10 Rich. 2.

<sup>4</sup> 21 and 22 Vict., c. 27 (Sir Hugh Cairns' Act).

<sup>5</sup> See *Durell v. Pritchard*, L. R. 1 Ch. 244.

<sup>6</sup> *Chincock v. Marchioness of Ely*, 2 H. & M. 220.

<sup>7</sup> *Corporation of Hythe v. East*, L. R. 1 Eq. 620.

<sup>8</sup> *Lewers v. Earl of Shaftesbury*, L. R. 2 Eq. 270; *Ferguson v. Wilson*, L. R. 2 Ch. 77.

<sup>9</sup> *Stokes v. The City Offices Co.*, 13 L. T. R. 81.

<sup>10</sup> See *Troy v. Clarke*, 30 Cal. 419. Where courts of equity exercise jurisdiction to assess damages, as in the case of a wrongful taking and detention of property, they will give neither vindictive nor speculative damages, but compensation only. *Sanders v. Anderson*, 10 Rich. Eq. 232.

<sup>11</sup> *Sayers v. Collyer*, 28 Ch. D. 107.

**§ 1256c. Damages as incidental relief.**

When equity has taken jurisdiction of a bill either for the restraint of a trespass, nuisance or other tort, or for the specific performance of a contract, and has granted the relief sought, it will commonly go on and do complete justice between the parties by giving damages for the tort or breach, rather than send the plaintiff back to a court of law, where he must go to the trouble and expense of another suit, merely to obtain in the end damages which it is entirely within the power of the court of equity to grant in the original suit.<sup>12</sup> It may of course happen that the injunction or decree for performance will of itself give complete relief, without the award of damages.<sup>13</sup>

**§ 1256d. Damages on failure to obtain equitable relief.**

Where a bill is filed for equitable relief and for some reason the court is unable or unwilling to grant the relief sought, it may nevertheless under some circumstances retain the bill for the purpose of granting damages rather than compel the plaintiff to bring a second action at law in order to obtain the damages which he is entitled to seek. This will always be done where the failure to obtain equitable relief is due to the fault of the defendant, by putting it out of his own power, after the trial begins, to grant the relief sought.<sup>14</sup> "It is well settled . . . that when a defendant in a bill in equity disenables himself, pending the suit, to comply with an order for specific relief, the court will proceed to afford relief by way of compelling compensation to be made, and for this purpose will retain the bill and determine the amount of such compensation, although its nature and measure are precisely the same as the party would otherwise recover as damages in an action at law."<sup>15</sup> So where a bill was brought to enjoin town officers from removing the plaintiff's building and obliterating his boundaries and pend-

<sup>12</sup> *Pomeroy, Eq.*, § 237. See *Atlantic & C. A. L. Ry. v. Victor Mfg. Co.*, 79 S. C. 266, 60 S. E. 675.

<sup>13</sup> *Cochrane v. Justice Min. Co.*, 4 Colo. App. 234, 35 Pac. 752.

<sup>14</sup> *New Hampshire: State v. Sunapee Dam Co.*, 72 N. H. 114, 55 Atl. 899.

*New York: O'Beirne v. Bullis*, 80 Hun, 570, 30 N. Y. Supp. 588.

*Vermont: Hazen v. Lyndonville Bank*, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680.

*Pomeroy, Eq.*, § 237, n. 3.

<sup>15</sup> *Milkman v. Ordway*, 106 Mass. 232.

ing the suit the town officers replied that they had already, since the filing of the bill, removed the building and graded down the lot, the court refused to dismiss the bill, but retained it for the assessment of damages.<sup>16</sup>

If the court finds it impossible to grant the equitable relief not because the defendant has disabled himself during the progress of the suit, but for some other reason unknown to the plaintiff at the time he filed his bill, the court will not in general punish the plaintiff for his ignorance or lack of foresight by compelling him to go to a court of law for relief, but since he is without fault, although it cannot grant the relief sought, it will give him damages. Thus, where by reason of defect of title, or for any other reason existing before suit brought, but unknown to the plaintiff, the court is unable to grant specific performance of a contract or injunction against a tort, it will nevertheless retain the bill and give damages.<sup>17</sup> And so, where, by reason of the expiration of the plaintiff's lease pending the suit, the court was unable to grant him the relief sought, he was allowed relief by way of damages.<sup>18</sup>

#### § 1256e. No damages where plaintiff should not have sued in equity.

If the circumstances are such that the plaintiff should not have brought his suit in equity, but have gone originally to the court of law, equity will not retain the bill to award damages even though on the face of the bill a proper case for the exercise of equitable jurisdiction is made out. In an old English case the plaintiff brought a bill to have an account of satisfaction for waste. The bill was brought after the defendant had assigned the term. Lord Hardwick said: "The ground of coming into this court is to stay the waste and not by way of satisfaction for the damages, but by way of prevention of the wrong, which courts of law cannot do in those instances where a prohibition of waste will not strictly lie; but in all these cases this court has gone further merely upon the maxim of preventing multiplicity of suits, which is the reason that determines this court in many

<sup>16</sup> *Lewis v. North Kingstown*, 16 R. I. 15, 11 Atl. 173, 27 Am. St. Rep. 724.

91 N. E. 555; *Pomeroy, Eq.*, § 237, n. 3. *Ante*, § 1021.

<sup>17</sup> *Stewart v. Joyce*, 205 Mass. 371, 18 *Case v. Minot*, 158 Mass. 577, 33 N. E. 700, 22 L. R. A. 536.

cases; . . . but nothing would tend to greater vexation than to admit of such bills as of the present after the term is at an end.”<sup>19</sup> So where the plaintiff knows before he files his bill that the equitable relief which he asks is impossible, or that the only relief he can get is damages, the bill will be dismissed and no damages will be granted.<sup>20</sup> So where equitable relief is refused because of the plaintiff’s own fault or laches, the court will not ordinarily retain the bill in order to grant legal relief by way of damages. Thus, where the plaintiff asked for the specific performance of a contract to convey land, but the court refused to grant specific performance on the ground that the consideration was inadequate, it being considerably less than half the value of the land, the court not only refused to grant the relief sought, but dismissed the bill without giving damages.<sup>21</sup>

#### § 1256f. Damages granted for the protection of the defendant.

Where the defendant is not really in fault, although it is not a case where the plaintiff on his own claims would be entitled to relief by way of damages, the court of equity may grant such relief as part of a general equitable settlement of the controversy. It is by this method that the New York courts have often granted complete compensation in the litigation arising out of the running of elevated railroads through the streets.<sup>22</sup> So where a city by the establishment of driven wells and pumping stations continuously caused injuries to the plaintiff through the drying up of a water course, and the absorption of underground waters, thereby injuring the plaintiff’s farm, and it appeared that the city was acting in a proper manner authorized by law, it was held that the court should not grant a permanent injunction, since the controversy ought to be settled by compelling the defendant to make full compensation in money to the plaintiffs; and the court therefore assessed the amount of

<sup>19</sup> *Jesus College v. Bloom*, 3 Atk. 262.

<sup>20</sup> *New York: Ellis v. Salmon*, 57 App. Div. 118, 67 N. Y. Supp. 1025.

*North Dakota: Knudtson v. Robinson*, 18 N. D. 12, 118 N. W. 1051.

*Pomeroy, Eq.*, § 237, n. 3.

<sup>21</sup> *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434.

<sup>22</sup> *Lynch v. Metropolitan E. R. R.*, 129 N. Y. 274, 29 N. E. 315, 15 L. R. A. 287, 26 Am. St. Rep. 523; *American B. N. Co. v. New York E. R. R.*, 129 N. Y. 252, 29 N. E. 302; *ante*, § 1196.

compensation and ordered the defendants to pay it and the plaintiffs to grant a release, in order that the entire controversy might be closed up in a single suit.<sup>23</sup> So where the plaintiff sued for an injunction against a dam maintained by the defendant under the mistaken belief that he had obtained the right to do so by eminent domain proceedings, and it appeared that the plaintiff had permitted the dam to be built and maintained for some time, the court refused to abate the damage on account of plaintiff's laches, but in order to close up the controversy it granted pecuniary damages.<sup>24</sup> The real ground for these decisions is not any claim of the plaintiff's to have his damages assessed in the action. The court is acting out of regard for the defendant's rights fully as much as for the plaintiff's. In the language of Gray, J., in *Westphal v. City of New York*,<sup>25</sup> "By coming in and submitting the matters in controversy between them and the defendant to a court of equity, the plaintiffs consented to the exercise of a jurisdiction which is plenary and unfettered in administering that full relief which will settle the controversy upon just principles. The plaintiffs renounced the right to pursue their remedy at law for the injuries suffered, and brought the matter on the equity side of the court, whereby it gained jurisdiction generally to adjust the disputes of the parties finally."

### § 1256g. Taking of an account.

In many branches of equity jurisdiction the court orders the taking of an account as a part of the relief administered. This, however, is not in any way the administering of damages for a wrong, but is merely ascertaining the state of the mutual rights of parties. Thus, in actions for the settlement of partnership affairs or in suits for the redemption of mortgages, the court will settle the accounts between parties and make a decree for the payment of the balance.<sup>26</sup> So in the case of a complicated account the court of equity may grant a decree for an accounting against fiduciaries or other accountable parties.<sup>27</sup> This, as has been said, is in no sense the allowance

<sup>23</sup> *Westphal v. New York*, 177 N. Y. 140, 69 N. E. 369.

<sup>24</sup> *Miller v. Cornwell*, 71 Mich. 270, 38 N. W. 912.

<sup>25</sup> 177 N. Y. 140, 69 N. E. 369.

<sup>26</sup> *Pomeroy, Eq.*, §§ 1190, 1421.

<sup>27</sup> *Pomeroy, Eq.*, §§ 1420 *et seq.*

of damage for the wrong and lies outside the scope of this work and we shall therefore not discuss the subject at greater length.

### § 1256h. Damages against a trustee for breach of trust.

A suit against a trustee is within the exclusive jurisdiction of equity and the relief administered is ordinarily a decree for an account. Where this is the case, the principles of the law of damages have no place. In case, however, of a conveyance by the trustee to a purchaser for value without notice, the *cestui que trust* may complain of the conveyance as a wrong to him and seek damages for it, or he may seek relief by way of an accounting. In no case is he entitled to damages in a court of law since the relation is not there recognized. Even, therefore, if he complains of the wrong done him and seeks for damages, he must do it in the court of equity. If he seeks an accounting merely, the trustee will be obliged to account for the amount received by him for the trust property. If, however, the plaintiff seeks damages for the wrong, he will be entitled to recover from the trustee the value of the property disposed of at the time the trustee transferred it, without regard to the amount received by the trustee upon the sale of it,<sup>23</sup> or, at his option, the amount received, with interest.<sup>29</sup>

### § 1256i. Time to which damages are assessed.

Since the purpose of equity in granting damages as partial or entire relief is to close up the entire controversy, the damages

<sup>23</sup> *New Jersey: General Proprietors v. Force*, 72 N. J. Eq. 56, 68 Atl. 914.

*Rhode Island: Manville Covering Co. v. Babcock*, 28 R. I. 496, 68 Atl. 421.

*Texas: Boothe v. Feist*, 80 Tex. 141, 15 S. W. 799, 19 S. W. 398; *Silliman v. Gano*, 90 Tex. 637, 39 S. W. 559, 40 S. W. 391; see *Mixon v. Miles*, 92 Tex. 318, 47 S. W. 966.

*Virginia: Norman v. Cunningham*, 5 Gratt. 63.

The price at which the trustee sold may be taken as the value, in the absence of other evidence. *Cross v. Cross*, 4 Gratt. 257.

Since the trustee is a fiduciary, the

beneficiary may, if he choose, demand the property, or its value at a later time. *Bell v. Bell*, 20 Ga. 250. As for instance at the time suit is brought. *Mixon v. Miles* (Tex. Civ. App.), 46 S. W. 105.

If no damages can be proved, because liens on the property equalled its value, nominal damages only can be recovered. *Thoman v. Mills*, 159 Mich. 402, 124 N. W. 33.

<sup>29</sup> *California: Clapp v. Vatcher*, 9 Cal. App. 462, 99 Pac. 549.

*New Jersey: General Proprietors v. Force*, 72 N. J. Eq. 56, 68 Atl. 914.

granted by the court in the case of a continuing injury will be brought down to the date of the decree, since otherwise the court could not by its decree prevent the necessity of a resort to an action at law to get a part of the relief to which the plaintiff is entitled.<sup>30</sup>

**§ 1256j. Damages assessed on legal principles.**

In *Stewart v. Joyce*<sup>31</sup> a bill was brought to set aside as fraudulent a sale and transfer of stock by the plaintiff to the defendant. Before the bill was filed the stock had been transferred to a purchaser for value, but under the circumstances the court retained the bill and gave relief by way of damages. The plaintiff claimed that the damages should be assessed as of the date of filing or of the final decree. The defendant contended that damages should be given as of the time of the original transfer; and the court so held. The case, the court said, was one for the assessment of damages purely. The failure to obtain the relief for which the plaintiff came into equity had no effect in enhancing the damages which he would otherwise have been entitled to recover, or in other words, equity in granting damages measures them by the same rules which prevail at law. In equity the plaintiff could have the sale set aside and the stock returned to him so far as it was within the power of the defendant to return it; but if that is not possible, and the court having jurisdiction of the cause proceeds to assess the damages instead of compelling him to bring an action at law, the rule of damages is and must be the same in one court as in another. The court then considered the case of *Fowle v. Ward*,<sup>32</sup> where one under a contract obligation to keep the plaintiff's shares in his hands disposed of them wrongfully, and the court allowed as damages the sum which would enable the plaintiff to replace the shares the defendant had disposed of. The court said, however, that in this case at bar the defendant was not bound to have the stock in his hands when the bill was brought, or at any other time until the

<sup>30</sup> *New York*: John D. Park & Sons Co. v. Hubbard, 134 App. Div. 468, 119 N. Y. Supp. 347.

*South Carolina*: Southern Ry. v. Gossett, 79 S. C. 372, 60 S. E. 956.

<sup>31</sup> 205 Mass. 371, 91 N. E. 555.

<sup>32</sup> 113 Mass. 548, 18 Am. Rep. 534.



plaintiff elected to avoid the sale, and defendant could rightfully sell and dispose of the stock to an innocent purchaser. The court also said that the case differed from cases relating to specific performance, "even if we assume that in case of a partial or total inability to perform the damages would be assessed as of the date of the bringing of the bill or of the entry of the final decree of which there may be some doubt."

The court added that if the defendant had disabled himself from conveying the stock by a sale after the bill was brought, a different rule might be applied; having evidently in mind the fact that in that case it would have become the duty of the defendant to retain the stock in his hands for the plaintiff's benefit, and in that case the damages, either at law or in equity, would be based on the higher value of the stock at the time when the defendant should have restored it.

#### § 1256k. Interest.

The general principles upon which interest is allowed by way of damages as a compensation for non-payment of money, appear to be the same at equity as in law. So upon a bill for an accounting it was laid down by the Supreme Court of the United States <sup>33</sup> that if the defendant has in his possession and control the means of determining the amount of his indebtedness he should ascertain it, and tender the amount due, even though the complainant may have considered himself entitled to an account, and to a greater sum as balance due him than was actually found to be due; and if the defendant does not make such a tender he becomes liable for interest. This is based on the general principle—which the court seems to regard as equally applicable to suits at law or in equity—that one who has had the use of money owing to another should pay interest on it from the time when the payment should have been made.

<sup>33</sup> *Spalding v. Mason*, 161 U. S. 375, 395, 16 Sup. Ct. 592, 40 L. ed. 739; *Crescent Mfg. Co. v. Wabash Mfg. Co.*, 151 U. S. 317, 323, 14 Sup. Ct. 348, 38 L. ed. 177; *Sturm v. Boker*, 150 U. S. 312, 342, 14 Sup. Ct. 99, 37 L. ed. 1093. For an elaborate review of the

whole subject of the allowance of interest see the opinion of Putnam, J., in *Nashua & Lowell R. R. v. Boston & Lowell R. R.*, 61 Fed. 237, 21 U. S. App. 50, a case in which it was allowed from the filing of the bill.

## CHAPTER LV

### PLEADING AND PRACTICE

#### I.—DAMAGES AS AFFECTED BY THE PLAINTIFF'S PLEADINGS

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|------------------------------------|---------------------------------------|
| § 1257. Averment of damage.        | § 1265. Special damages—Actions for   |
| 1258. Damages beyond amount        | injury to real estate.                |
| laid.                              | 1266. For breach of contract.         |
| 1259. Method of curing the error.  | 1267. Against carriers.               |
| 1260. Averment of damage not       | 1268. For injury to personal prop-    |
| otherwise material.                | erty.                                 |
| 1261. Special damages.             | 1269. For loss of business.           |
| 1262. Prospective damages.         | 1270. For personal injury.            |
| 1263. Exemplary, double and treble | 1270a. Extent of allegation required. |
| damages.                           | 1271. For other torts.                |
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#### II.—PRACTICE

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|--------------------------------------|--------------------------------------|
| § 1272. Damages upon demurrer        | § 1281. Award of arbitrators.        |
| overruled.                           | 1282. Costs.                         |
| 1273. Upon plea in abatement.        | 1283. Obsolete judgment of “dam-     |
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| 1279. Joint torts.                   | junction.                            |
| 1280. Several torts by different de- |                                      |
| fendants in the same suit.           |                                      |

#### § 1257. Averment of damage.

\* The most important remark to be made on this part of our subject, is as to the necessity of distinctly averring in the declaration the damage of which the plaintiff complains. Great nicety was once used in regard to the peculiar mode of allegation; thus, it has been doubted whether an averment was sufficiently clear and positive if preceded by the word “whereby,” or “thereupon,” on the ground that the words following the “whereby” or “thereupon” could not be considered as

containing an averment of *matter of fact*, but merely matter of conclusion or inference drawn from the matters previously alleged. But it now seems to be well settled, that where the allegation following such a word as "thereupon" or "whereby" is clearly intended as an *allegation* of fact, the matter is to be considered averred with sufficient directness; the word "thereupon" or "whereby" not being understood as showing that the proposition following such word is intended to be stated as a consequence deducible from what precedes, but only as showing the time at which, or the occasion on which, that which follows the word in question is averred to have taken place.<sup>1</sup> But if the averment is merely one of a legal liability, it is well established that such an averment, being one of matter of law, will not supply the want of those allegations of fact from which alone the court could infer the law to be as stated; so that such allegation is useless when the declaration is insufficient, and superfluous when sufficient without it. But the allegation of damage is only required to be of the fact as it exists in legal contemplation.<sup>2</sup> So an allegation that the plaintiff has been put to great expense, will be satisfied by proof that he has incurred a liability to pay;<sup>3</sup> \*\* though an allegation that the plaintiff has paid money will not be satisfied by such proof.<sup>4</sup>

The amount of damage is to be stated generally;<sup>5</sup> and if there is a general statement of damage this will justify recovery though none of the items of special damage are proved.<sup>6</sup> If, however, the only damage stated is special damage, upon

<sup>1</sup> Pryce v. Belcher, 3 C. B. 58; Brown v. Mallett, 5 C. B. 599.

<sup>2</sup> But this rule of the common-law practice is changed by the new codes of procedure, which require the statement of the actual facts, and not merely the averment of their legal effect. Garvey v. Fowler, 4 Sandf. 665.

<sup>3</sup> Richardson v. Chasen, 10 Q. B. 756.

<sup>4</sup> Minnesota: Ward v. Haws, 5 Minn. 440.

Texas: Texas S. L. Ry. v. Patton (Tex. Civ. App.), 96 S. W. 774; El Paso

El. Ry. v. Sierra (Tex. Civ. App.), 109 S. W. 986.

England: Pritchett v. Boevey, 1 Cr. & M. 775; Jones v. Lewis, 9 Dowl. Pr. 143. But see *contra*, Standard D. & D. Co. v. Hill, 166 Fed. 99, 92 C. C. A. 83.

<sup>5</sup> International & G. N. R. R. v. Cruseturner, 44 Tex. Civ. App. 181, 98 S. W. 423. If the amount is left blank, nothing can be recovered. Lexington Ry. v. Britton, 130 Ky. 676, 114 S. W. 295.

<sup>6</sup> Harrison v. Argyle Co., 128 App. Div. 81, 112 N. Y. Supp. 477.

failure to prove any item of special damage, nothing can be recovered on account of general damage.<sup>7</sup> In some states it is not necessary to allege more than the amount of damages claimed,<sup>8</sup> while in others the items making up the general damages must be separately valued.<sup>9</sup> Such matters of local practice cannot be profitably dealt with in a general work.

### § 1258. Damages beyond amount laid.

\* In regard to the amount of damages to be averred, it is only necessary to lay them so high as to cover the injury; for no recovery can be had beyond the amount in the declaration.\*\* If the jury assess the damages at a sum beyond the amount laid in the declaration, and judgment be entered for the whole amount of damages found by the jury, it is error.<sup>10</sup> In Vir-

<sup>7</sup> *Christophulos Cafe Co. v. Phillips*, 4 Ga. App. 819, 62 S. E. 562; see *Wright v. Smith*, 128 Ga. 432, 57 S. E. 684.

<sup>8</sup> *Sherlag v. Kelley*, 200 Mass. 232, 86 N. E. 293.

<sup>9</sup> *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413 (value of property converted).

<sup>10</sup> *Arkansas: White v. Cannada*, 25 Ark. 41; *Snow v. Grace*, 25 Ark. 570.

*California: Clark v. San Francisco & S. J. V. Ry.*, 142 Cal. 614, 76 Pac. 507.

*Colorado: Wilcox v. Field*, 1 Colo. 3.

*Illinois: Walcott v. Holcomb*, 24 Ill. 331; *Pierson v. Finney*, 37 Ill. 29, 87 Am. Dec. 233; *Kelley v. Third Nat. Bank*, 64 Ill. 541.

*Indiana: Epperly v. Little*, 6 Ind. 344; *Hall v. Hall*, 42 Ind. 585.

*Iowa: David v. Conard*, 1 Greene, 336; *Cameron v. Boyle*, 2 Greene, 154.

*Kentucky: Edwards v. Wiester*, 2 A. K. Marsh. 382; *Rowan v. Lee*, 3 J. J. Marsh. 97; *South Covington & C. Ry. v. Raymer*, 132 Ky. 187, 116 S. W. 281.

*Louisiana: W. W. Carre & Co. v. Masse*, 113 La. 608, 37 So. 530.

*Maryland: Attrill v. Patterson*, 58 Md. 226.

*New Hampshire: Taylor v. Jones*, 42 N. H. 25.

*New Jersey: Hawk v. Anderson*, 9 N. J. L. 319; *Lake v. Merrill*, 10 N. J. L. 288.

*New York: Curtiss v. Lawrence*, 17 Johns. 111; *Dox v. Dey*, 3 Wend. 356, 20 Am. Dec. 702; *Fish v. Dodge*, 4 Denio, 311; *Cohen v. Wittemann*, 100 App. Div. 338, 91 N. Y. Supp. 493.

*North Carolina: Grist v. Hodges*, 3 Dev. L. 198, 203.

*Pennsylvania: Lantz v. Frey*, 19 Pa. 366.

*Tennessee: Fowlkes v. Webber*, 8 Humph. 530.

*Texas: Moore v. Republic*, 1 Tex. 563.

*England: Hoblins v. Kimble*, 1 Bulst. 49; *Cheveley v. Morris*, 2 W. Black. 1300.

So, on a counterclaim. *Annis v. Upton*, 66 Barb. 370.

It has been held in *Missouri* to be error not to instruct the jury that the damages are limited to the amount claimed. *Spohn v. Missouri Pac. Ry.*, 116 Mo. 617, 22 S. W. 690.

But in *Calumet I. & S. Co. v. Martin*, 115 Ill. 358, it was held error to instruct the jury that they must not give damages above the *ad damnum*.

So where a certain amount of exemplary damages is claimed, no more

ginia and West Virginia judgment may exceed the amount averred by the amount of interest accrued since the filing of the declaration.<sup>11</sup>

In an action of replevin, however, the damages claimed in the writ are damages for detention; and the amount awarded as the value of the goods, upon the plaintiff's election to take such value, is not limited by the *ad damnum*.<sup>12</sup> Where double damages are claimed, the actual damage is limited by the *ad damnum*, but the double damages may be given in addition.<sup>13</sup>

### § 1259. Method of curing the error.

If the jury render a verdict in excess of the amount averred to be due, the plaintiff may remit the excess before judgment without order of court,<sup>14</sup> but after judgment he cannot enter a *remittitur* without permission.<sup>15</sup> After judgment the court may give the plaintiff his election between entering a *remittitur* of the excess and retrying the case.<sup>16</sup>

### § 1260. Averment of damage not otherwise material.

\* It was anciently held, both in actions of *indebitatus assumpsit* and *insimul computassent*, that the plaintiff could not recover any less amount of damages than the precise sum laid in the declaration.<sup>17</sup> But it is now well settled otherwise: and thus, even in an action on a policy of insurance averring a total loss, a recovery may be had for a partial loss.<sup>18</sup> \*\* This

can be recovered. *Gregory v. Coleman*, 3 Tex. Civ. App. 166, 22 S. W. 181.

<sup>11</sup> *Virginia*: *Cahill v. Pintony*, 4 Munf. 371.

*West Virginia*: *Enoch v. Mining & P. Co.*, 23 W. Va. 314.

<sup>12</sup> *Anderson v. Carlin*, 24 Fla. 199.

<sup>13</sup> *Rosevelt v. Hanold*, 65 Mich. 414.

<sup>14</sup> *Maryland*: *Harris v. Jaffray*, 3 H. & J. 543.

*Virginia*: *Cahill v. Pintony*, 4 Munf. 371.

<sup>15</sup> *Davenport v. Bradley*, 4 Conn. 309.

<sup>16</sup> *Maryland*: *Lewis v. Cooke*, 1 H. & McH. 159; *Attrill v. Patterson*, 58 Md. 226, 260.

*Missouri*: *Crews v. Lackland*, 67 Mo. 619.

*New Jersey*: *Herbert v. Hardenbergh*, 10 N. J. L. 222.

*New York*: *Corning v. Corning*, 6 N. Y. 97; *Droege v. Interurban St. Ry.*, 91 N. Y. Supp. 71.

*Canada*: *Wilde v. Crow*, 10 Up. Can. C. P. 406.

In *Connecticut*: it was held that a *remittitur* could not be entered, but the case must go back to trial upon the question of damages only. *Davenport v. Bradley*, 4 Conn. 309.

<sup>17</sup> *Sayer on Damages*, ch. x, pp. 43 *et seq.*; *Bagnal v. Sacheverel*, Cro. Eliz. 292; *Ramsden's case*, Clayton, 87.

<sup>18</sup> *Chitty on Pleadings*, vol. i, p. 371; *Marshall on Insurance*, 629.

necessarily follows from the fact that, except as fixing a limit beyond which recovery cannot be had, the averment of the amount of damages is not a material one. The amount of damages alleged is not a traversable averment, and is not admitted by a failure to deny it.<sup>19</sup> In some States it is provided by statute that in actions of contract no proof of damage shall be required upon default;<sup>20</sup> and in California the averment of amount of damages appears to be material in every case, so that upon failure to deny the amount the plaintiff recovers the whole amount claimed in his declaration.<sup>21</sup>

### § 1261. Special damages.

\* A question of more frequent occurrence is, as to the necessity of averring the particular cause and extent of any special damage for which the plaintiff claims redress.\*\*

"Damages," says Mr. Chitty,<sup>22</sup> "are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing. . . . It does not appear necessary to state the formal description of damages in the declaration, because presumptions of law are not in general to be pleaded or averred as facts. . . . But when the law does not *necessarily imply* that the plaintiff sustained damage by the act complained of,

<sup>19</sup> *Indiana*: *McLees v. Felt*, 11 Ind. 218.

*New York*: *Raymond v. Traffarn*, 12 Abb. Pr. 52.

*Wisconsin*: *Jenkins v. Steanka*, 19 Wis. 126, 88 Am. Dec. 675.

<sup>20</sup> *Kansas*: *Cole v. Hoeburg*, 36 Kan. 263, 59 Am. Rep. 546.

*Oregon*: *White v. Northwest Stage Co.*, 5 Ore. 99.

<sup>21</sup> *Patterson v. Ely*, 19 Cal. 28;

*Dimick v. Campbell*, 31 Cal. 238; *Huston v. Twin & C. C. T. R. R.*, 45 Cal. 550.

<sup>22</sup> Chitty on Pleading, 410, 411, cited in *Dumont v. Smith*, 4 Denio, 319. "The damages sustained are matter of evidence, and need not be alleged, nor are they scarcely ever stated but in a general manner." *Barruso v. Madan*, 2 Johns. 149.

it is essential to the validity of the declaration that the resulting damage should be shown with particularity. . . . And whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent the surprise on the defendant which might otherwise ensue on the trial, the plaintiff must in general state the particular damage which he has sustained, or he will not be permitted to give evidence of it."<sup>23</sup>

Mr. Chitty's satisfactory statements of the distinction between general and special damages leave little to be added. All legal damages must, whether the action be in contract or in tort, *naturally* result from the act or default complained of; and although the law in certain cases permits the recovery of such damages as are physically secondary or consequential, yet they must in legal contemplation be also its *proximate* result. Where such result is necessary, or is legally imported by the facts, the damages are general, and need not be specifically set forth in the pleading;<sup>24</sup> otherwise they must, whether such special damage is or is not essential to the maintenance of the action.<sup>25</sup> In the one case, the statement of the cause

<sup>23</sup> See, also, Chitty on Pleading, 370 *et seq.*; same subject. See, also, *De Forest v. Leete*, 16 Johns. 122, where it is held that in an action on the covenant against incumbrances, it was not enough to aver that the premises were incumbered, but that the declaration must set out the extinguishment of the incumbrance.

See also the following cases:

*Indiana*: *Lindley v. Dempsey*, 45 Ind. 246.

*Louisiana*: *Arrowsmith v. Gordon*, 3 La. Ann. 105.

*Mississippi*: *Burrage v. Melson*, 48 Miss. 237.

*New York*: *Butler v. Kent*, 19 Johns. 228; *Fitch v. Fitch*, 35 N. Y. Super. Ct. 302.

*South Carolina*: *Robert R. Sizer & Co. v. Dopson*, 72 S. E. 464.

<sup>24</sup> *Iowa*: *Palmer v. Waterloo*, 138 Ia. 296, 115 N. W. 1017.

*Kentucky*: *Cumberland T. & T. Co.*

*v. Overfield*, 127 Ky. 548, 106 S. W. 242; *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384.

*Missouri*: *Van Buskirk v. Quincy*, O. & K. C. R. R., 131 Mo. App. 357, 111 S. W. 832.

*New Hampshire*: *Stevens v. Lyford*, 7 N. H. 360.

*Pennsylvania*: *Rank v. Rank*, 5 Pa. 211; *Hart v. Evans*, 8 Pa. 13.

*South Dakota*: *Fritz v. Watertown*, 21 S. D. 280, 111 N. W. 630.

*Texas*: *Moore v. Smith*, 19 S. W. 781.

*Vermont*: *Hutchinson v. Granger*, 13 Vt. 386.

<sup>25</sup> *United States*: *The Director*, 11 Sawy. 494; *Lanston M. M. Co. v. Mergenthaler Linotype Co.*, 154 Fed. 42, 83 C. C. A. 154.

*Alabama*: *Lewis v. Paull*, 42 Ala. 136;

*Irby v. Wilde*, 150 Ala. 402, 43 So. 574.

*California*: *Numan v. San Francisco*, 38 Cal. 689.

*Colorado*: *Tucker v. Parks*, 7 Colo. 62.

of action sufficiently apprises the defendant of the extent of the claim. In the other, legal justice, in order to enable him to prepare his defence, requires the further averment of the injurious consequences. Special damages must be pleaded in equity as in law.<sup>26</sup> \* But it is no ground of demurrer to an entire breach in an action of covenant, that certain consequential damages alleged are not recoverable. If the plaintiff is entitled to recover for any damage, it is sufficient to support the breach.<sup>27</sup> \*\*

In alleging special damages, it is not enough, in most jurisdictions, merely to enumerate the heads of special damages for which compensation will be asked, but the facts of the damage and claim for compensation must be specifically alleged;<sup>28</sup> and in Texas the claim must be fully itemized.<sup>29</sup>

*Connecticut:* Bristol Mfg. Co. v. Gridley, 28 Conn. 201.

*Florida:* Jacksonville Elec. Co. v. Batches, 54 Fla. 192, 44 So. 933.

*Illinois:* Olmstead v. Burke, 25 Ill. 86.

*Kentucky:* Louisville & N. R. R. v. Roney, 32 Ky. L. Rep. 1326, 108 S. W. 343.

*Louisiana:* Roberts v. Hyde, 15 La. Ann. 51.

*Maryland:* McTavish v. Carroll, 13 Md. 429.

*Massachusetts:* Baldwin v. Western R. R., 4 Gray, 333; Warner v. Bacon, 8 Gray, 397, 69 Am. Dec. 253; Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

*Michigan:* Shaw v. Hoffman, 21 Mich. 151.

*Minnesota:* Chamberlain v. Porter, 9 Minn. 260.

*Missouri:* Ingles v. Metropolitan St. Ry., 145 Mo. App. 241, 129 S. W. 493.

*Nebraska:* Rosecrans v. Asay, 49 Neb. 512, 68 N. W. 627; Armagost v. Rising, 54 Neb. 763, 75 N. W. 534.

*New Hampshire:* Troy v. Cheshire R. R., 23 N. H. 83, 55 Am. Dec. 177; Gove v. Watson, 61 N. H. 136.

*New Jersey:* Ryerson v. Marseillis, 16 N. J. L. 450,

*New York:* Reporters' Assoc. v. Sun P. & P. Assoc., 186 N. Y. 437, 79 N. E. 710; Keefe v. Lee, 197 N. Y. 68, 90 N. E. 344; Hallock v. Belcher, 42 Barb. 199; Solms v. Lias, 16 Abb. Pr. 311; Toplitz v. King Bridge Co., 46 N. Y. Supp. 418; Isman v. Loring, 130 App. Div. 845, 115 N. Y. Supp. 93.

*Pennsylvania:* Agnew v. Johnson, 22 Pa. 471, 62 Am. Dec. 303.

*Texas:* Gulf, C. & S. F. Ry. v. Craft (Tex. Civ. App.), 102 S. W. 170; Missouri, K. & T. Ry. v. Linton (Tex. Civ. App.), 109 S. W. 942.

*Utah:* McKinney v. Carson, 35 Utah, 180, 99 Pac. 660.

*Washington:* Fish v. Nethercutt, 14 Wash. 582, 45 Pac. 44, 53 Am. St. Rep. 892.

*Wisconsin:* Birchard v. Booth, 4 Wis. 67.

<sup>26</sup> Hooper v. Armstrong, 69 Ala. 343.

<sup>27</sup> Amory v. Brodrick, 5 B. & Ald. 712.

<sup>28</sup> *Kentucky:* Chesapeake & O. Ry. v. Crank, 128 Ky. 329, 108 S. W. 276.

*Texas:* Pipher v. Bissonet (Tex. Civ. App.), 36 S. W. 770.

*Washington:* Hubenthal v. Spokane & I. Ry., 43 Wash. 677, 86 Pac. 955.

<sup>29</sup> Houston E. & W. T. Ry. v. Adams, 44 Tex. Civ. App. 288, 98 S. W. 222.



### § 1262. Prospective damages.

Prospective damages need not in general be specially averred;<sup>30</sup> and recovery may be had for a permanent injury without an express allegation of permanency.<sup>31</sup> In a few cases, however, it is held that, unless the description of the injury itself makes future pain probable, no recovery can be had for it without an allegation.<sup>32</sup> So in an action by a husband for a battery on his wife it was held that damages from a permanent loss of her services must be specially alleged.<sup>33</sup> And the same was held in an action for death of an adult son.<sup>34</sup> Where the declaration alleged the injuries to have been committed between a day named and the date of the writ, the plaintiff was not allowed to recover damages to the date of the service of the writ.<sup>35</sup>

### § 1263. Exemplary, double and treble damages.

It is held in some jurisdictions that the claim for exemplary damages need not be specially pleaded.<sup>36</sup> But in other jurisdictions it is required that they be specially claimed<sup>37</sup> and even

<sup>30</sup> *California*: Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266, 13 Am. St. Rep. 175.

*Maine*: Bradbury v. Benton, 69 Me. 194.

*Missouri*: Gerdes v. Christopher & S. A. I. & F. Co., 124 Mo. 347, 25 S. W. 557; Bartley v. Trorlicht, 49 Mo. App. 214.

<sup>31</sup> *Missouri*: Gerdes v. Christopher & S. A. I. & F. Co., 124 Mo. 347, 25 S. W. 557; De Courcy v. Prendergast Const. Co., 140 Mo. App. 169, 120 S. W. 632.

*New York*: Lynch v. Third Ave. R. R., 59 N. Y. Super. Ct. 71, 13 N. Y. Supp. 236; Tyler v. Third Ave. R. R., 41 N. Y. Supp. 523.

In *Texas*, however, it has been held that an allegation that a personal injury is permanent will not justify the recovery of damages for future suffering where no pecuniary damages are alleged from such suffering. Houston & T. C. R. R. v. Lindsey, 51 Tex. Civ. App. 67, 110 S. W. 995.

<sup>32</sup> *Iowa*: Palmer v. Waterloo, 138 Ia. 296, 115 N. W. 1017.

*Texas*: Rapid Transit Ry. v. Allen, 54 Tex. Civ. App. 245, 117 S. W. 486.

<sup>33</sup> Uertz v. Singer Mfg. Co., 35 Hun, 116.

<sup>34</sup> Winnt v. International & G. N. R. R., 74 Tex. 32.

<sup>35</sup> Prouty v. Bell, 44 Vt. 72.

<sup>36</sup> *Alabama*: Alabama G. S. R. R. v. Arnold, 84 Ala. 159, 4 So. 359, 5 Am. St. Rep. 354.

*Georgia*: Savannah, F. & W. Ry. v. Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158.

*Iowa*: Gustafson v. Wind, 62 Ia. 281.

*Maine*: Wilkinson v. Drew, 75 Me. 360.

*Minnesota*: Andrews v. Stone, 10 Minn. 72.

*Mississippi*: Southern Ex. Co. v. Brown, 67 Miss. 260, 7 So. 318, 8 So. 425, 19 Am. St. Rep. 306.

*Oregon*: Stark v. Epler, 117 Pac. 276.

<sup>37</sup> *Missouri*: Anderson v. Shockley (Mo. App.), 140 S. W. 755.

*Texas*: Galveston, H. & S. A. R. R. v. Le Gierse, 51 Tex. 189; Zelif v.

that their amount be stated.<sup>38</sup> Where such damages are claimed on the ground of malice, malice must be averred in the complaint.<sup>39</sup> But where statutory double or treble damages are claimed, the declaration must allege that the action is brought under the statute.<sup>40</sup> The plaintiff, however, having claimed such statutory damages, may recover single damages if he does not prove himself to be entitled to the benefit of the statute.<sup>41</sup> In *Osburn v. Lovell*<sup>42</sup> it was held, that in an action of trespass, to recover treble damages, evidence that the trespass was involuntary, and under a *bona fide* claim of right, might be given under the general issue. Cooley, J., said: "It was held, in *Delevan v. Bates*,<sup>43</sup> that whatever, in an action of tort, would go in mitigation of damages might be given in evidence under the general issue."

### § 1264. Interest.

Interest on a liquidated demand must be specially claimed, not on an unliquidated demand.<sup>44</sup>

### § 1265. Special damages—Actions for injury to real estate.

\* In New York, in an action on the case, in which the plaintiff declared against the defendant for placing a quantity of lime, sand, and other building material opposite to his store, so that the free passage to it was interrupted, and the dust and dirt of the materials blew into his store and damaged his goods, it was held, that proof that customers were prevented from frequenting the store, and that a tenant who occupied it left it

Jennings, 61 Tex. 458, 48 Am. Rep. 305; *International & G. N. Ry. v. Smith*, 62 Tex. 252; *Moore v. Smith*, 19 S. W. 781.

<sup>38</sup> *Krone v. Block*, 144 Mo. App. 575, 129 S. W. 43.

<sup>39</sup> *Johnson v. Chicago, R. I. & P. Ry.*, 51 Ia. 25; *Jones v. Marshall*, 56 Ia. 739. There need be no special allegation of malice in an action for malicious prosecution, since the allegation of the cause of action includes malice. *Davis v. Seeley*, 91 Ia. 583, 60 N. W. 183.

<sup>40</sup> *Kentucky: Bell v. Norris*, 79 Ky. 48, 42 Am. Rep. 204.

*Pennsylvania: Hughes v. Stevens*, 36 Pa. 320.

<sup>41</sup> *Starkweather v. Quigley*, 7 Hun, 26.

<sup>42</sup> 36 Mich. 246.

<sup>43</sup> 1 Mich. 97; *acc.*, *Allis v. Nanson* 41 Ind. 154.

<sup>44</sup> *Kansas: Shepard v. Pratt*, 16 Kan. 209.

*Texas: Watkins v. Junker*, 90 Tex. 586, 40 S. W. 11; *San Antonio & A. P. Ry. v. Timon* (Tex. Civ. App.), 110 S. W. 82. See *St. Louis S. W. Ry. v. Starks* (Tex. Civ. App.), 109 S. W. 1003.

in consequence of the nuisance, whereby it remained empty, was inadmissible, because not alleged in the declaration as special damages. "Where the damages," said the Supreme Court, "actually sustained do not necessarily arise from the act complained of, and consequently are not implied by law, in order to prevent surprise to the defendant, the plaintiff must state in his declaration the particular damage which he has sustained, or he will not be permitted to give evidence of it upon the trial. . . . There is no claim for damages in the declaration for the loss of customers. . . . The loss of the tenant and the consequent loss of the rent of the store, ought to have been specially alleged, in order to entitle the plaintiff to have proved them as damages."<sup>45</sup>

So, in a later case in the same State, in an action of trespass on the case, the declaration alleged that the defendant, in consideration of the sale by the plaintiff to him of certain premises in the city of New York, covenanted that he would erect on them a brick dwelling-house, and would not erect on them any building to be occupied in any manner that would be a nuisance to the vicinity of the premises. The declaration then proceeded to aver that the defendant had not erected a brick dwelling-house, but had permitted a bake-house to be erected on the premises, and suffered it to be occupied in a manner that was a nuisance to the vicinity of the premises. There was no allegation of special damage, but the declaration concluded generally, to the damage of the plaintiff \$6,000. On the trial the plaintiff's counsel offered to prove actual damage sustained by him in the depreciation of the value of premises owned by him, adjacent to the lot in question, occasioned by the erection of the bake-house. But the evidence was excluded on the ground of the want of any allegation of special damage in the declaration; and the judge who tried the cause held that the plaintiff could only recover nominal damages. By consent, a nonsuit was ordered, and on motion to set this aside the Supreme Court held the decision right. "Suppose," said Cady, J., "the bake-house has been so occupied as that it has been a nuisance. How has it damnified the plaintiff? The declaration does not show that he has been annoyed by the heat and smoke

<sup>45</sup> *Squier v. Gould*, 14 Wend. 159, 160.

issuing from the bake-house, or that he has any property which has been lessened in value by the bake-house." <sup>46</sup> \*\*

In the following cases the damages are special, and must be alleged: For loss of rents in actions for injury to real estate.<sup>47</sup> So, in an action for throwing water back upon the plaintiff's mill.<sup>48</sup> So, also, in an action for polluting the water of a stream;<sup>49</sup> so for profits of a mill lost by the obstruction of a water-course,<sup>50</sup> and for damage to plaintiff's house from smoke and sparks, and damage to plastering and paper, and the damages for the additional care required for children, in an action for laying a railroad along a street in front of the plaintiff's house.<sup>51</sup> For nuisance in maintaining stagnant water no recovery can be had for sickness or death of a child unless specially alleged;<sup>52</sup> and for trespass in throwing down fences no recovery is allowed, without special allegation, for loss of crops by the entry of cattle.<sup>53</sup> On the other hand, no allegation is required, in an action of trespass *quare clausum*, to recover damage to a fence, by breaking which the defendant entered the land.<sup>54</sup> And the damage from the stoppage of the plaintiff's mill is an injurious consequence, for which he may recover in an action of trespass for the destruction of his milldam, without specially averring it in the declaration.<sup>55</sup> So in proceedings to recover compensation for land taken by eminent domain, damages to the land not taken are not special damages in the sense that they must be specially pleaded in order to be proved.<sup>56</sup>

## § 1266. For breach of contract.

No allegation of special damage is necessary for loss of profit

<sup>46</sup> Bogert v. Burkhalter, 2 Barb. 525.

<sup>47</sup> Adams v. Barry, 10 Gray, 361; Parker v. Lowell, 11 Gray, 353.

<sup>48</sup> Plimpton v. Gardiner, 64 Me. 360.

<sup>49</sup> Potter v. Froment, 47 Cal. 165. In this case it was also held that the cost of boiling and skimming the water must also be specially alleged in order to be proved; but in Jutte v. Hughes, 67 N.Y. 267, where the plaintiff's premises were injured by the defendant's failure to keep his privies and drains in repair, it was held that loss of rent need not be alleged as special damage.

<sup>50</sup> Taylor v. Dustin, 43 N. H. 493; Crawford v. Parsons, 63 N. H. 438.

<sup>51</sup> Spencer v. St. Paul & S. C. Ry., 21 Minn. 362.

<sup>52</sup> Gulf, C. & S. F. Ry. v. Craft (Tex. Civ. App.), 102 S. W. 170.

<sup>53</sup> Carron v. Clark, 14 Mont. 301, 36 Pac. 178.

<sup>54</sup> Clark v. Boardman, 42 Vt. 667, 1 Am. Rep. 359.

<sup>55</sup> Spigelmoyer v. Walter, 3 W. & S. 540.

<sup>56</sup> Yellowstone Park R. R. v. Bridger Coal Co., 34 Mont. 545, 87 Pac. 963.

which would have been the direct result of work done at the contract price, and which is prevented by the defendant's wrongful act.<sup>57</sup> So in an action of covenant for breach of contract in not building a house, in payment of which the plaintiff was to have conveyed certain premises, no statement of special damages is necessary to entitle the plaintiff to give evidence of the difference in value between the house and the premises which constitutes the measure of damages.<sup>58</sup> In an action for breach of contract to give a lease, damages for loss of business<sup>59</sup> and for the expense of removal<sup>60</sup> have been held recoverable without special allegation. But in an action for breach of contract to furnish doors, the plaintiff, a master builder, cannot recover damages on account of the idleness of his workmen, caused by not having the doors, without special allegation.<sup>61</sup> In an action for breach of promise of marriage, no allegation of special damage is necessary for loss of time and expenses incurred in preparation for marriage,<sup>62</sup> but an allegation is necessary for loss of health<sup>63</sup> and for seduction.<sup>64</sup>

Where damages beyond legal interest for non-payment of a note at maturity are allowed by law, as a penalty, they cannot be recovered unless specially averred.<sup>65</sup> Counsel fees in actions on attachment bonds must be claimed as special damages. It may be that no counsel were necessary, and none were employed.<sup>66</sup> So on injunction bonds.<sup>67</sup> No allegation is necessary to recover special damages for loss of sheep by disease communicated by other sheep warranted by the defendant; the plaintiff need not allege that the sheep so warranted were to be placed with the others.<sup>68</sup> But consequential damages from breach of warranty of a chain must, it has been held, be spe-

<sup>57</sup> *Michigan*: Burrell v. New York & S. S. S. Co., 14 Mich. 34.

*Missouri*: Hesse v. Imperial E. L. H. & P. Co. (Mo. App.), 140 S. W. 911.

<sup>58</sup> *Laraway v. Perkins*, 10 N. Y. 371.

<sup>59</sup> *Ward v. Smith*, 11 Price, 19.

<sup>60</sup> *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283.

<sup>61</sup> *Myer v. Davies*, 17 Ill. App. 228.

<sup>62</sup> *Smith v. Sherman*, 4 Cush. 408.

<sup>63</sup> *Bedell v. Powell*, 13 Barb. 183.

<sup>64</sup> *Indiana*: Cates v. McKinney, 48 Ind. 562, 17 Am. Rep. 768.

*Wisconsin*: Leavitt v. Cutler, 37 Wis. 46.

<sup>65</sup> *Wilson v. Dean*, 10 Ia. 432.

<sup>66</sup> *Dothard v. Sheid*, 69 Ala. 135.

<sup>67</sup> *Washington v. Timberlake*, 74 Ala. 259.

<sup>68</sup> *Packard v. Slack*, 32 Vt. 9, 76 Am. Dec. 148.

cially alleged,<sup>69</sup> as must consequential damages for failure to deliver goods sold.<sup>70</sup> And in general consequential damages for breach of a contract must be specially claimed.<sup>71</sup>

### § 1267. Against carriers.

In an action for injuries sustained by the plaintiff from the neglect of the defendant (a carrier of passengers by steamers) to furnish proper accommodations and supplies, it was held that, under an allegation of facts whereby the plaintiff was "subjected to great inconvenience and injury," proof might be introduced tending to prove the plaintiff's illness, and the negligence of the defendant causing such illness, this not being considered by the court to be special damage.<sup>72</sup> Where a carrier lost or damaged part of a suit of clothes, the depreciation of value of the remaining parts of the suit is general, not special, damage.<sup>73</sup> And where a valuable horse is injured, the fact that he was of superior value for breeding purposes need not be alleged, since it is general damage,<sup>74</sup> though loss of the earnings or use of the horse is special damage and must be alleged.<sup>75</sup>

### § 1268. For injury to personal property.

In the Queen's Bench, in an action on the case for an excessive distress, it was held, that no mention being made in the declaration of the *sale*, either for damage or by way of substantive complaint, the plaintiff could only recover damages in

<sup>69</sup> *Sutherland v. Round*, 57 Fed. 467, 6 C. C. A. 428.

<sup>70</sup> *Brady v. Cassidy*, 9 Misc. 107, 29 N. Y. Supp. 45.

<sup>71</sup> *Kentucky*: *McDaniel v. Hutcherson*, 136 Ky. 412, 124 S. W. 384 (contract to furnish plaintiff a home during life; expense of removal must be alleged).

*Texas*: *Houston & T. C. R. R. v. Anderson*, 44 Tex. Civ. App. 394, 98 S. W. 440 (injury to water tank by causing oil to run into it; consequential damage to land must be alleged).

*Vermont*: *Ellis v. Durkee*, 79 Vt. 341, 65 Atl. 94 (contract to pay for stock;

assessment laid after breach and paid by plaintiff must be alleged).

*Washington*: *Sudden v. Morse*, 48 Wash. 101, 92 Pac. 901.

<sup>72</sup> *Roberts v. Graham*, 6 Wall. 578, 18 L. ed. 791.

<sup>73</sup> *Cone v. Southern Ry.*, 85 S. C. 524, 67 S. E. 779.

<sup>74</sup> *Missouri*: *Van Buskirk v. Quincy, O. & K. C. R. R.*, 131 Mo. App. 357, 111 S. W. 832.

*Texas*: *Texas & P. Ry. v. Newsome*, 44 Tex. Civ. App. 513, 98 S. W. 646.

<sup>75</sup> *Van Buskirk v. Quincy, O. & K. C. R. R.*, 131 Mo. App. 357, 111 S. W. 832.

respect to the detention of the property, and not for the sale.<sup>76</sup> But where in an action in the nature of a trespass for the wrongful seizure of goods, which was the gist of the action, although the form of the plaintiff's complaint was limited to certain heads of special damage which were not proved; but it appeared that the taking was wrongful, the plaintiff was held, by the judicial committee of the Privy Council, entitled not only to nominal damages, but to such substantial damage as the jury thought adequate.<sup>77</sup> In an action of trespass *de bonis asportatis*, a special allegation of damage has been required for the expense of recovering the property.<sup>78</sup> In actions of trover or replevin and of trespass for the destruction of property, all damages beyond the value of the property, if recoverable at all, must be specially alleged.<sup>79</sup> So for damages beyond the intrinsic value of a book destroyed by the defendant, on the ground that it contained a subscription list procured at large expense.<sup>80</sup> So in an action for the loss of an animal through negligence, of damages beyond its value, such as money properly expended in efforts to cure it.<sup>81</sup>

In Indiana, in an action of trespass for killing a mare, damages for nursing and feeding two colts she had been suckling, and for care and attention of the mare's wound, not having been alleged, were held not recoverable.<sup>82</sup> Where an action is brought for taking property from the owner's possession, no damages can be recovered, without special allegation, for an injury received by the owner in an attempt to defend his possession.<sup>83</sup> It has been held that damages for loss of use of

<sup>76</sup> *Thompson v. Wood*, 4 Q. B. 493.

<sup>77</sup> *Doss v. Doss*, 14 L. T. R. (N. S.) 646.

<sup>78</sup> *Illinois*: *People v. Crowe*, 145 Ill. App. 450.

*Minnesota*: *Gray v. Bullard*, 22 Minn. 278.

<sup>79</sup> *California*: *Stevenson v. Smith*, 28 Cal. 102, 87 Am. Dec. 107.

*Michigan*: *Brink v. Freoff*, 44 Mich. 69.

*Mississippi*: *Burrage v. Melson*, 48 Miss. 237.

*Pennsylvania*: *Schofield v. Ferrers*, 46 Pa. 438.

*Vermont*: *Park v. McDaniels*, 37 Vt. 594.

*Canada*: *Domville v. Keevan*, Stev. Dig. (N. B.) 434 (*semble*; *contra*, *Firth v. Fitzgerald*, Stev. Dig. 432).

But see *Maine*: *Bucknam v. Nash*, 3 Fairf. 474.

<sup>80</sup> *Nunan v. San Francisco*, 38 Cal. 689.

<sup>81</sup> *Patten v. Libbey*, 32 Me. 378.

<sup>82</sup> *Teagarden v. Hetfield*, 11 Ind. 522.

<sup>83</sup> *Plumb v. Ives*, 39 Conn. 120.

property detained may be recovered without special allegation; <sup>84</sup> but the contrary opinion has also been held. <sup>85</sup>

### § 1269. For loss of business.

For loss of business, in the sense of loss of time, no allegation is necessary; but for a loss caused to the plaintiff's particular business by the defendant's act a special allegation is required. <sup>86</sup> Upon a general allegation of loss of business the plaintiff cannot recover for the loss of a particular business venture or engagement. <sup>87</sup> Nor under such an allegation can a farmer recover damages for the loss of his hay crop. <sup>88</sup> So upon a general allegation of loss of market, the plaintiff cannot show the loss of a particular contract of sale. <sup>89</sup>

### § 1270. For personal injury.

No allegation is necessary in an action to recover for personal injury, of bodily pain, <sup>90</sup> nor, in some jurisdictions, of mental suffering. <sup>91</sup> In an action for seduction mental suffering is a basis for recovery without special allegation. <sup>92</sup> So in an action for personal injuries, proof of damages from the interruption of the plaintiff's occupation, and deprivation of his accustomed means of earning support, is inadmissible unless

<sup>84</sup> *Woodruff v. Cook*, 25 Barb. 505.

<sup>85</sup> *Illinois*: *Adams v. Gardner*, 78 Ill. 568.

*Kentucky*: *Montgomery v. Glasscock*, 121 S. W. 668.

<sup>86</sup> *Connecticut*: *Taylor v. Monroe*, 43 Conn. 36; *Tomlinson v. Derby*, 43 Conn. 562.

*Illinois*: *Chicago v. O'Brennan*, 65 Ill. 160.

<sup>87</sup> *Alabama*: *Pollock v. Gantt*, 69 Ala. 373.

*Illinois*: *Chicago W. D. Ry. v. Klauber*, 9 Ill. App. 613.

<sup>88</sup> *Heiser v. Loomis*, 47 Mich. 16.

<sup>89</sup> *Rowe v. Titus*, 1 All. (N. B.) 326.

<sup>90</sup> *Nebraska*: *Fink v. Busch*, 83 Neb. 599, 120 N. W. 167.

*New York*: *Curtis v. Rochester & S. R. R.*, 18 N. Y. 534, 75 Am. Dec. 258; *Swarthout v. New Jersey S. B.*

*Co.*, 46 Barb. 222; *Klein v. Burleson*, 138 App. Div. 405, 122 N. Y. Supp. 752.

<sup>91</sup> *Georgia*: *Central R. R. & B. Co. v. Lanier*, 83 Ga. 587, 10 S. E. 279.

*Indiana*: *Wright v. Compton*, 53 Ind. 337.

*Iowa*: *Gronan v. Kukkuck*, 59 Ia. 18.

*Missouri*: *Brown v. Hannibal & S. J. Ry.*, 99 Mo. 310.

*Nebraska*: *Fink v. Busch*, 83 Neb. 599, 120 N. W. 167.

*New York*: *Caldwell v. Central Park, N. & E. R. R.*, 7 Misc. 67, 27 N. Y. Supp. 397.

*Virginia*: *Norfolk & W. Ry. v. Spears*, 110 Va. 110, 65 S. E. 482.

*Contra, Oregon*: *Adcock v. Oregon R. & N. Co.*, 45 Ore. 173, 77 Pac. 78.

<sup>92</sup> *Phillips v. Hoyle*, 4 Gray, 568, 64 Am. Dec. 95.



such damages are specially alleged.<sup>93</sup> In *Tomlinson v. Derby*<sup>94</sup> the plaintiff was injured through a defect in the highway. The complaint alleged that the plaintiff was thereby "prevented from attending to his ordinary business." It was held, that he could not show that he was earning \$100 a month in carting and sawing timber. Loomis, J., said:

"Special damage is that which the law does not necessarily imply that the plaintiff has sustained from the act complained of. . . . It would seem, however, that when the consequences of an injury are peculiar to the circumstances and condition of the injured party, the law could not imply the damage simply from the act causing the injury. If it be true that the law implies a loss of time from the act complained of, it does not seem quite fair and just, when the sole object of the rule that requires special damage to be averred is to advise the defendant of the claim, to carry the implication so far as to imply also all the special consequences of such loss of time, when such consequences must depend on the peculiar circumstances of the plaintiff at the time of and previous to the injury, as that he was actually engaged in some special business which was at the time yielding a pecuniary profit."

<sup>93</sup> *Alabama*: *Irby v. Wilde*, 150 Ala. 402, 43 So. 574.

*Connecticut*: *Morris v. Winchester R. A. Co.*, 73 Conn. 680, 49 Atl. 180; *Farrington v. Cheponis*, 82 Conn. 258, 73 Atl. 139.

*Indiana*: *Pittsburgh, C., C. & S. L. Ry. v. Lynch*, 43 Ind. App. 177, 87 N. E. 40.

*Kentucky*: *Louisville & N. R. R. v. Reynolds*, 24 Ky. L. Rep. 1402, 71 S. W. 516; *Central Ky. Tract. Co. v. Chapman*, 130 Ky. 342, 113 S. W. 438; *Lexington Ry. v. Britton*, 130 Ky. 676, 114 S. W. 295; *Cincinnati, N. O. & T. P. Ry. v. Silvers*, 126 S. W. 120.

*Massachusetts*: *Baldwin v. Western R. R.*, 4 Gray, 333.

*Missouri*: *Keen v. St. Louis, I. M. & S. R. R.*, 129 Mo. App. 301, 108 S. W. 1125; *Fleddermann v. St. Louis Transit Co.*, 134 Mo. App. 199, 113 S. W. 1143; *Moellman v. Gieze-Hensel-*

*meier Lumber Co.*, 134 Mo. App. 485, 114 S. W. 1023; *Hitchings v. Maryville*, 134 Mo. App. 712, 115 S. W. 473; *Ingles v. Metropolitan St. Ry.* (Mo. App.), 129 S. W. 493; *Snickles v. St. Joseph*, 155 Mo. App. 308, 136 S. W. 752.

*New York*: *Hart v. Metropolitan St. Ry.*, 121 App. Div. 732, 106 N. Y. Supp. 494.

*Texas*: *Texas & P. Ry. v. Buckalew* (Tex. Civ. App.), 34 S. W. 165; *Ft. Worth & D. C. Ry. v. Morrison* (Tex. Civ. App.), 129 S. W. 1157 (but see *El Paso S. W. R. R. v. Barrett*, 46 Tex. Civ. App. 14, 101 S. W. 1025, 121 S. W. 570).

*Contra, New York*: *Bloom v. Manhattan El. Ry.*, 17 N. Y. Supp. 812 (except in case of married woman).

*England*: *Potter v. Metropolitan Ry.*, 28 L. T. Rep. 735.

<sup>94</sup> 43 Conn. 562.

In *Taylor v. Monroe*,<sup>95</sup> under a similar allegation, it was held, that the plaintiff could not show that she was employed as a button-maker, and what wages she earned. Loomis, J., said:

"As the business is not stated, nor any earnings or loss of earnings mentioned, the allegation referred to can only be construed as intended to characterize the injury, and indicate its extent and permanence in a general way, which amounts simply to a claim for general damages, and lays no foundation at all for proof of special damages. The evidence referred to was not intended simply to show the effect and extent of the injury, but to enhance the damages, by showing the loss of earnings in a special employment, requiring some special skill and training. These damages, therefore, were not the necessary result of the acts set out in the declaration, and could not be implied by law; but they were special damages, which, in order to prevent a surprise upon the defendant, must be particularly specified in the declaration, or the plaintiff will not be permitted to give evidence of them at the trial."

In an action by an unmarried woman against a carrier for personal injury from his negligence, her diminished chances of marriage must be specially alleged to entitle her to an enhancement of the damages on that ground.<sup>96</sup> In Missouri it has been held that no recovery can be had for medical expenses, in an action for assault and battery, unless specially alleged,<sup>97</sup> but on general principles this seems doubtful. In an action for false imprisonment, damages from the bad condition of the jail are special, and can only be proved when alleged.<sup>98</sup> So sickness caused by the imprisonment must be specially alleged.<sup>99</sup>

<sup>95</sup> 43 Conn. 36, 46.

<sup>96</sup> *Hunter v. Stewart*, 47 Me. 419.

<sup>97</sup> *Alabama*: *Irby v. Wilde*, 150 Ala. 402, 43 So. 574.

*Indiana*: *Pittsburgh, C., C. & S. L. Ry. v. Lynch*, 43 Ind. App. 177, 87 N. E. 40.

*Kentucky*: *Lexington Ry. v. Britton*, 130 Ky. 676, 114 S. W. 295.

*Missouri*: *O'Leary v. Rowan*, 31 Mo. 117; *Fleddermann v. St. Louis Transit Co.*, 134 Mo. App. 199, 113 S. W. 1143.

*Texas*: *Houston & T. C. R. R. v. Rowell*, 92 Tex. 147, 46 S. W. 630; *Houston, E. & W. T. Ry. v. Adams*, 44 Tex. Civ. App. 288, 98 S. W. 222.

<sup>98</sup> *Johnson v. Von Kettler*, 84 Ill. 315.

<sup>99</sup> *Kansas*: *Atchison, T. & S. F. R. R. v. Rice*, 36 Kan. 593, 14 Pac. 229.

*England*: *Lowden v. Goodrick*, *Peake's Cas.* 46; *Pettit v. Addington*, *Peake's Cas.* 62.

Miscarriage as a result of a physical injury is special damages which must be pleaded,<sup>100</sup> and so is the postponement of a wedding.<sup>101</sup>

The particularity required in the allegation of such special damages varies in different jurisdictions. The limit of particularity appears to be reached in Texas, where not only is an exact description of the injury required,<sup>102</sup> but in the case of medical expenses, apparently, the amount and value of each physician's services and an itemized account of the medicines bought must be given.<sup>103</sup>

### § 1270a. Extent of allegation required.

Not only must special damages be alleged in order to be recovered, but the allegation must describe them with sufficient precision to give the defendant notice of the extent of the claim. It is impossible to reconcile all the decisions upon this point. In New York the following rules seem established: If the allegations as to the physical injury are very broad, setting up sickness, permanent injury, etc., the plaintiff may under them prove any special damage that has occurred, *e. g.*, an injury to his spine. If the defendant desires to guard against surprise, it is his business to move for a bill of particulars. But if the allegation point to a definite injury, *e. g.*, an injury to the arm, the plaintiff cannot prove some other injury, *e. g.*, deafness, merely because there are general allegations of severe injury and shock.<sup>104</sup> In accordance with these rules general

<sup>100</sup> *Louisville & N. R. R. v. Roney*, 32 Ky. L. Rep. 1326, 108 S. W. 343.

<sup>101</sup> *Beath v. Rapid Ry.*, 119 Mich. 512, 78 N. W. 537.

<sup>102</sup> *Suderman v. Woodruff*, 47 Tex. Civ. App. 229, 105 S. W. 217.

<sup>103</sup> *The Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117; *acc.*, *Louisville & N. R. R. v. Barnwell*, 131 Ga. 791, 63 S. E. 501.

<sup>104</sup> *Ehrgott v. Mayor*, 96 N. Y. 264; *Hergert v. Union Ry.*, 49 N. Y. Supp. 307, 25 App. Div. 218; *Kleiner v. Third Ave. R. R.*, 55 N. Y. Supp. 394, 36 App. Div. 191; *Bolte v. Third Ave. R. R.*, 56 N. Y. Supp. 1038, 38 App. Div. 234.

So in the following cases it was held that after a description of specific injuries an undescribed injury of the sort could not be recovered. *Keefe v. Lee*, 197 N. Y. 68, 90 N. E. 344 (allegation of kick on head, breaking skull and tearing scalp; cannot recover for deafness); *Johnson v. Troy*, 124 App. Div. 29, 108 N. Y. Supp. 917 (injured in back, head, and side, causing him to be made sick, sore and lame; cannot recover for supervening appendicitis); *Long v. Fulton Contr. Co.*, 133 App. Div. 842, 117 N. Y. Supp. 1118 (skull crushed, necessitating removal of part of skull and brain, and great pain suffered; cannot show epilepsy, paraly-

allegations have been held to cover injuries not specifically mentioned.<sup>105</sup> On the other hand, where all the allegations

sis, and mental impairment); *Keenan v. Metropolitan St. Ry.*, 118 App. Div. 56, 103 N. Y. Supp. 61 (husband suing for loss of wife's services alleged that she kept house for him; could not show that she assisted him in his duties as janitor).

On the other hand, in *Frobisher v. Fifth Ave. Transp. Co.*, 81 Hun, 544, 30 N. Y. Supp. 1099, an allegation that plaintiff had become disabled for life so as to interfere with the active prosecution of his business permitted evidence of loss of business. But in *Kinsella v. Riesenbergs*, 124 App. Div. 322, 108 N. Y. Supp. 876, an allegation of severe injuries to the back and side was held insufficient to allow proof of any injury of the sort.

<sup>105</sup> *United States: Denver & R. G. Ry. v. Harris*, 122 U. S. 597, 7 Sup. Ct. 1286, 30 L. R. A. 1146 (general allegation of physical injury, recover for impotency); *New York Transp. Co. v. Garside*, 157 Fed. 521, 85 C. C. A. 285 (plaintiff disabled, crippled and injured in her limbs; may show one leg shorter than the other, also that she was unable to sleep and lost in weight and appetite).

*Colorado: Denver & R. G. R. R. v. Mitchell*, 42 Colo. 43, 94 Pac. 289 (suffered great personal injuries; may show injury to lungs).

*Iowa: Fox v. Chicago, S. P. & K. C. R. R.*, 86 Ia. 368, 53 N. W. 259 (suffered great expense; may show that a mattress, quilt and springs were injured by applications of medicine to plaintiff's foot).

*Kansas: Cudahy Packing Co. v. Broadbent*, 70 Kan. 535, 79 Pac. 126 (leg broken and great pain suffered; may show that eight days after the leg was set it was necessary to break and reset it, causing great pain).

*Kentucky: Cincinnati, N. O. & T. P.*

*Ry. v. Halcomb*, 105 S. W. 968, 32 Ky. L. Rep. 381 (long confined to bed and unable to teach school; may recover for impaired ability to earn money); *Cumberland T. & T. Co. v. Overfield*, 127 Ky. 548, 106 S. W. 242 (permanent disability; may show permanent reduction in power to earn money).

*Michigan: Beath v. Rapid Ry.*, 119 Mich. 512, 78 N. W. 537 (mental suffering, may recover for mortification of being obliged to use crutch and cane); *Groat v. United Ry.*, 153 Mich. 165, 116 N. W. 1081 (greatly injured and bruised internally, and permanently injured; may show permanent injury to uterus).

*Missouri: Van Cleve v. St. Louis, M. & S. E. R. R.*, 124 Mo. App. 224, 101 S. W. 632 (chest bruised and crushed, and permanent injury; may show pulmonary tuberculosis); *Hitchings v. Maryville*, 134 Mo. App. 712, 115 S. W. 473 (is and will be incapacitated from earning livelihood; recover for lost earnings from date of injury).

*Texas: Rea v. St. Louis S. W. Ry.* (Tex. Civ. App.), 73 S. W. 555 (injury to lungs; may recover for increased susceptibility to lung disease); *San Antonio & A. P. Ry. v. Beam* (Tex. Civ. App.), 50 S. W. 411 (injury incapacitated plaintiff from making a living; may recover for diminished capacity to labor); *San Antonio & A. P. Ry. v. Corley* (Tex. Civ. App.), 26 S. W. 903 (mental agony; recover for peril and fright); *Triolo v. Foster* (Tex. Civ. App.), 57 S. W. 698 (suffered great pain; recover for mental pain); *St. Louis S. W. Ry. v. Garber* (Tex. Civ. App.), 111 S. W. 227 (permanent incapacity; recover for diminished earning capacity); *Ft. Worth & D. C. Ry. v. Morrison* (Tex. Civ. App.), 123 S. W. 621 (internal injuries; may recover for injury to blad-

of special damages are of specific injuries, it is usually held that there can be no recovery for injuries not described,<sup>106</sup> though recovery has been allowed in some cases.<sup>107</sup>

### § 1271. For other torts.

In Alabama, it has been held, that in an action brought by a firm for a malicious prosecution, proof of special damage arising from loss of reputation, credit, or business, cannot be given

der); *Missouri, K. & T. Ry. v. Brown* (Tex. Civ. App.), 140 S. W. 1172 (permanent injury, capacity to earn probably destroyed; may recover for loss of time).

*Washington*: *Clukey v. Seattle El. Co.*, 27 Wash. 70, 67 Pac. 379 (hurt about the abdomen, and unnatural internal bleeding; may recover for miscarriage).

See, however, several cases cited in the following note.

<sup>106</sup> *Kentucky*: *Louisville Ry. v. Gaugh*, 133 Ky. 467, 118 S. W. 276 (injury to head alleged; cannot show resulting deafness).

*Michigan*: *Fuller v. Jackson*, 92 Mich. 197, 52 N. W. 1075 (injury to spine, and otherwise bruised, wounded, and injured; cannot show injury to breast); *Hall v. Cadillac*, 114 Mich. 99, 72 N. W. 33 (knee wrenched, greatly bruised and injured, became sick, sore, lame, and disabled, suffered great pain and distress; cannot show resulting rheumatism).

*Montana*: *Gordon v. Northern Pac. Ry.*, 39 Mont. 571, 104 Pac. 679 (right eye cut and destroyed, suffered excruciating pain; cannot show impairment of sight of left eye).

*Texas*: *Missouri, K. & T. Ry. v. Cook*, 8 Tex. Civ. App. 376, 27 S. W. 769 (wounded, skinned and bruised, and greatly shocked and injured in head, chest, lungs, back, spine, and limbs, and sustained serious external and internal injuries; cannot recover for impairment of genital and urinary

organs); *Campbell v. Cook*, 86 Tex. 632, 26 S. W. 486, reversing 24 S. W. 977 (tearing flesh, bruising, wounding and injuring back, bowels, hips, legs and other parts and members of body; cannot recover for impairment of capacity to have sexual intercourse).

*Utah*: *Pugmire v. Oregon S. L. R. R.*, 33 Utah, 27, 92 Pac. 762 (blow on head, back sprained, arms bruised and sprained, right limb injured, and internal injuries; cannot recover for injury to eyes).

*Washington*: *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091 (hip dislocated, leg paralyzed, abdomen bruised, shock to nervous system, physical health greatly impaired; cannot show excessive menstruation).

<sup>107</sup> *United States*: *Katahdin P. & P. Co. v. Peltomaa*, 156 Fed. 342, 84 C. C. A. 238 (injured on head and shoulders, left arm broken, injured in arms, legs, and sides, suffered great pain in body and mind; may recover for resulting nervous disturbances and other internal injuries).

*Michigan*: *Montgomery v. Lansing C. E. Ry.*, 103 Mich. 46, 61 N. W. 543 (plaintiff seriously hurt, wounded and crippled, and back and spine seriously injured; may show injury to lung and resulting consumption).

*Texas*: *Missouri, K. & T. Ry. v. Edling*, 18 Tex. Civ. App. 171, 45 S. W. 406 (wound on side, two ribs fractured, internal injuries to lungs, chest and heart; may show injury to kidney).

unless it is specially averred in the declaration.<sup>108</sup> And the principle has been recognized in South Carolina<sup>109</sup> and Pennsylvania.<sup>110</sup> For slander of the plaintiff in either a public or private official capacity no allegation of special damage is necessary;<sup>111</sup> but special damage must be alleged for injury to an author from the disparagement of a copyrighted work.<sup>112</sup> In an action for slander for words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent for the plaintiff to prove, and the jury to assess, damages for a general loss or decrease of trade, although the declaration alleges loss of particular customers as special damage, which is not proved;<sup>113</sup> and where language is libellous *per se*, and is calculated to affect the credit and reputation, damages may be recovered for injury to credit and reputation without special allegation.<sup>114</sup> Only nominal damages can be recovered against a sheriff for not executing a deed on a partition sale, unless special damages are alleged.<sup>115</sup> An allegation is necessary for recovery of the expenses occasioned by the fraudulent imitation of trade-marks.<sup>116</sup>

In an action for wrongful levy on exempt property, the expense of legal proceedings to assert the exemption and of hauling the goods back to the plaintiff's house cannot be recovered without special allegation.<sup>117</sup> In an action for wrongfully allowing defendant's bucks to mingle with plaintiff's ewes, no damages can be recovered, without special allegation, for the expense of men to care for the ewes and sheds to protect them.<sup>118</sup> In an action for alienating the affections of a husband, mental suffering may be recovered without special allegation.<sup>119</sup>

<sup>108</sup> *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

<sup>109</sup> *Rowand v. Bellinger*, 3 Strobb. 373.

<sup>110</sup> *Stanfield v. Phillips*, 78 Pa. 73.

<sup>111</sup> *Foulger v. Newcomb*, L. R. 2 Ex. 327.

<sup>112</sup> *Swan v. Tappan*, 5 Cush. 104.

<sup>113</sup> *Evans v. Harries*, 1 H. & N. 251.

<sup>114</sup> *Warner Instrument Co. v. Ingersoll*, 157 Fed. 311.

<sup>115</sup> *Lusk v. Briscoe*, 65 Mo. 555.

<sup>116</sup> *Dixon v. Fawcus*, 3 L. T. R. (N. S.) 693.

<sup>117</sup> *Boggan v. Bennett*, 102 Ala. 400, 14 So. 742.

<sup>118</sup> *McKinney v. Carson*, 35 Utah, 180, 99 Pac. 660.

<sup>119</sup> *Kansas: Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492.

*Kentucky: Klein v. Klein*, 101 S. W. 382, 31 Ky. L. Rep. 28.

## § 1271a. Answers.

Great variety of practice prevails as to the necessity of setting up in a plea or answer matters in mitigation or reduction of damages. In the common-law system of pleading no matter of mitigation needed pleading, but the damages might be decreased by evidence introduced under the general issue, and under modern systems of pleading this is still true in general; <sup>120</sup> for allegations of damage are not issuable, and the plea should state only facts which if true would bar recovery. But under modern codes of procedure notice of matters of mitigation must in some cases be given in the answer, and it is sometimes held in jurisdictions having a code of procedure that matters in mitigation generally must be pleaded by the defendant.<sup>121</sup>

## II.—PRACTICE

## § 1272. Damages upon demurrer overruled.

When upon a demurrer judgment is given for the plaintiff, damages are to be assessed upon testimony; as has been seen, the amount of damages claimed is not to be allowed without proof. The defendant has a right to be heard on the question of damages,<sup>122</sup> and may reduce them to a nominal amount.<sup>123</sup>

\* Where there is a demurrer to evidence and a joinder, the court may have the damages assessed by the jury conditionally, or they may discharge the jury, leaving the damages to be assessed by another jury, should the demurrer be overruled.<sup>124</sup> \*\* If a demurrer to a declaration in a suit by drawer

<sup>120</sup> *Georgia*: McPherson v. Chandler, 72 S. E. 948.

*Indiana*: Blizzard v. Applegate, 61 Ind. 368 (except by statute, in defamation).

*Michigan*: Osborn v. Lovell, 36 Mich. 246.

*Missouri*: Beck v. Dowell, 40 Mo. App. 71 (except by statute, in defamation).

*Vermont*: Collins v. Perkins, 31 Vt. 624.

<sup>121</sup> *Kentucky*: Cincinnati, N. O. & T. P. Ry. v. Crabtree, 100 S. W. 318, 30 Ky. L. Rep. 1000.

*Missouri*: State v. Dickmann (Mo. App.), 124 S. W. 29 (in defamation).

*New York*: Bradner v. Faulkner, 93 N. Y. 515.

See *Georgia*: Atlantic C. L. R. R. v. Powell, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769.

<sup>122</sup> *Hanley v. Sutherland*, 74 Me. 212.

<sup>123</sup> *Croghan v. Schiele*, 53 Conn. 186, 55 Am. Rep. 88.

<sup>124</sup> *Florida*: Hanover F. I. Co. v. Lewis, 23 Fla. 193.

*Indiana*: Andrews v. Hammond, 8 Blackf. 540.

See Bull. N. P. 314, 2 Tidd's Pr. 786.

against acceptor be overruled, the court may, in Indiana, assess the damages so far as the amount due on the bill is concerned; but as to the costs of the protest, if chargeable at all, there must be a jury.<sup>125</sup> So upon any undisputed document the court may assess damages without a jury;<sup>126</sup> but where a doubtful question of fact is involved, like interest on a foreign judgment, a jury must be called in.<sup>127</sup> On a *venire tam quam*, to try an issue as to one count, and assess contingent damages on demurrer to others, if the plaintiff be nonsuited as to the issue, he cannot proceed to assess contingent damages on the counts demurred to.<sup>128</sup> When a declaration in assumpsit contains a common count, after judgment for the plaintiff on demurrer, a writ of inquiry should be awarded to ascertain the damages.<sup>129</sup> In Connecticut, however, it is said that "an inquest is merely to inform the conscience of the court," and may therefore be dispensed with; and the practice in that State, when a demurrer by the defendant is overruled, is for the court to assess damages in all cases.<sup>130</sup> In Maine the plaintiff has the option of demanding a jury.<sup>131</sup> In Illinois the court may assess damages without a jury.<sup>132</sup>

### § 1273. Upon plea in abatement.

Where issue on a plea in abatement is found for the plaintiff, the judgment against the defendant is final, and the same jury should assess the damages. If they fail, however, to do so, under the practice in Kentucky, a jury to inquire of damages may be called, instead of ordering a *venire de novo*.<sup>133</sup>

### § 1274. Upon plea to the damage.

\* There has been much discussion how far a plea can be put in to the damage only; and the reasonable rule appears to be

<sup>125</sup> Phipps v. Addison, 7 Blackf. 375.

In the same State, in debt on a sheriff's bond upon the execution of a writ of inquiry, after a demurrer to the replication, assigning breaches has been overruled, the *quantum* of the relator's damages is the only subject of inquiry. Clark v. The State, 7 Blackf. 570.

<sup>126</sup> Harrington v. Witherow, 2 Blackf. 37.

<sup>127</sup> Evans v. Irvin, 1 Port. 390.

<sup>128</sup> Packard v. Hill, 7 Cow. 434.

<sup>129</sup> Stanton v. Henderson, 1 Ind. 69.

<sup>130</sup> Havens v. Hartford & N. H. R. R. 28 Conn. 69, 91.

<sup>131</sup> Hanley v. Sutherland, 74 Me. 212.

<sup>132</sup> Hopkins v. Ladd, 35 Ill. 178.

<sup>133</sup> Weathers v. Mudd, 12 B. Mon. 112.



that such a plea is bad, unless the damage is so essentially the cause of action that without it the suit could not be maintained.<sup>134</sup> \*\* So where the defendant rightfully entered the plaintiff's close, but did unnecessary damage in carrying away goods, damage being the cause of action, it was held that a plea denying unnecessary damage was an issuable allegation.<sup>135</sup> But where a complaint alleged the monthly rental value of premises to be \$125, and the answer denied that the value was more than \$75, it was held that no judgment could issue without a finding of the value.<sup>136</sup>

### § 1275. Upon default.

A judgment by default is an admission of the plaintiff's right to recover damages, but not as to the amount of damages; and upon a writ of inquiry, the defendant has a right to cross-examine the plaintiff's witnesses,<sup>137</sup> and the plaintiff has the right to open and close.<sup>138</sup> The plaintiff, on default, must prove his damages, or he can recover nominal damages only.<sup>139</sup> So where, in an action for trespass, the plaintiff took judgment by default, but gave no evidence of circumstances of aggravation, it was held that although these were alleged in the pleadings, they were not admitted by the default, and exemplary damages could not be given.<sup>140</sup> So in an action for injury to property through negligence, it was held that, upon an assessment of damages after default, the defendant could reduce the amount to nominal damages by showing that there was no

<sup>134</sup> *New Jersey*: *Hopple v. Higbee*, 23 N. J. L. 342.

*New York*: *Saltus v. Kip*, 2 Abb. Pr. 382.

*England*: *Robinson v. Marchant*, 7 Q. B. 918; *Wilby v. Elston*, 8 C. B. 142; *Reindel v. Schell*, 4 Jur. (N. S.) 310, 27 L. J. (C. P.) 146.

<sup>135</sup> *Carpenter v. Barber*, 44 Vt. 441.

<sup>136</sup> *Chuck v. Quan Wo Chong* (Cal.), 28 Pac. 45.

<sup>137</sup> *Arkansas*: *Thompson v. Haislip*, 14 Ark. 220; *Mizell v. McDonald*, 25 Ark. 38.

*Florida*: *Russ v. Gilbert*, 19 Fla. 54, 45 Am. Rep. 1.

*Illinois*: *Chicago & R. I. R. R. v. Ward*, 16 Ill. 522.

<sup>138</sup> *Wausau Boom Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739.

<sup>139</sup> *Kentucky*: *Daniel v. Judy*, 14 B. Mon. 393.

*New Hampshire*: *Willson v. Willson*, 25 N. H. 229, 57 Am. Dec. 320.

*New York*: *Connoss v. Meir*, 2 E. D. Smith, 314; *Hackett v. Richards*, 3 E. D. Smith, 13.

*North Carolina*: *McLeod v. Nimocks*, 122 N. C. 437, 29 S. E. 577.

<sup>140</sup> *Chicago & I. R. R. v. Baker*, 73 Ill. 316.

negligence on his part.<sup>141</sup> But the jury cannot, after a default, find for the defendant;<sup>142</sup> they must find at least one mill as damages.<sup>143</sup> The court may, as in case of demurrer overruled, assess damages where the amount is certain; but the value of foreign money must be found by a jury,<sup>144</sup> and so in any case where questions of fact are involved.<sup>145</sup>

### § 1276. Entire or several damages—Joinder of good and bad counts.

\* We have already said, that an important question may arise as to the assessment of entire or several damages. The jury may assess entire or distinct damages on each of the counts, when separate injuries have been proved. If distinct damages be assessed, judgment may be given on either of the counts; but if the jury find entire damages on all the counts, the judgment must be entire; and in this case, if one of the counts be insufficient, judgment will be arrested, or a writ of error be sustainable.<sup>146</sup> This may be where a good count is joined to a bad count; or where a bad assignment of breaches is joined with good; or where counts, though good in themselves, are improperly joined; or where a single count contains good and bad causes of action; and in those cases, if general damages be assessed, the practice has been different. If the verdict can be amended or applied to the good counts, this in some

<sup>141</sup> *Batchelder v. Bartholomew*, 44 Conn. 494.

<sup>142</sup> *Ellis v. State*, 2 Ind. 262.

<sup>143</sup> *Frazier v. Lomax*, 1 D. C. (1 Cr. C. C.) 328. In Lower Canada it seems that the court always assesses damages upon default. *Vadeboncoeur v. Mason*, 5 Rev. Leg. 238.

<sup>144</sup> *Maunsell v. Massareene*, 5 T. R. 87.

<sup>145</sup> *Maund v. Loeb*, 87 Ala. 374.

<sup>146</sup> *Chitty on Pleading*, vol. i, p. 447; *Hambleton v. Veere*, 2 Saunders, 169; *Eddowes v. Hopkins*, 1 Doug. 376; *Grant v. Astle*, 2 Doug. 722. In this case Lord Mansfield, while he maintained the doctrine, declared the rule "inconvenient, ill-founded, and absurd," and called attention to the fact,

that it did not apply to criminal prosecutions. But in *O'Connell v. Reginald*, 9 Jurist, 25, the same principle was applied to an indictment for conspiracy. See, also, *Cheetham v. Tilotson*, 5 Johns. 430. The rule in civil actions has been affirmed in England. *Eliot v. Allen*, 1 C. B. 18. Where a breach gives no data to regulate the assessment of damages, though it negative the words of the condition of the bond, it is not well assigned. *People v. Russell*, 4 Wend. 570. But if so assigned that the plaintiff would be entitled to nominal damages only, it is not enough. *Albany Dutch Church v. Vedder*, 14 Wend. 165; *Backus v. Richardson*, 5 Johns. 476.

cases will be done.<sup>147</sup> And it has been said, in England, to be a settled rule that, "if the same count contains two demands or complaints, for one of which the action lies, and not for the other, all the damages shall be referred to the good cause of action, although it would be otherwise if they were in separate counts."<sup>148</sup>

### § 1277. Judgment when arrested.

But if the verdict cannot be awarded or applied to the good counts, then the question is, whether the cause should be tried again, or the judgment entirely arrested. In some cases the judgment has been arrested;<sup>149</sup> and this still seems the practice in England, where counts, good in themselves, were improperly joined, which is in truth a misjoinder of causes of action;<sup>150</sup> but where good counts are joined with bad, the rule now seems to be that a new trial will be awarded.<sup>151</sup> Such seems the well-settled system in England; but in some parts of our Union, a more rational rule has been adopted. In Connecticut, the Supreme Court has said, that "if there be good and bad counts, or good and bad matter in the same count, the presumption, in our courts, is, that damages are given on the good parts."<sup>152</sup> So, in Ohio, if the declaration contains a good count among defective counts, the court on error will intend that the verdict was well taken on the good count, unless the record shows that it was rendered upon those that were defective.<sup>153</sup> Mr. Sergeant Williams, in his valuable notes to Saunders' Reports,<sup>154</sup> after collecting a great number of cases on this subject, observes that the result of them all appears to be, that where it is ex-

<sup>147</sup> Chitty on Pleadings, 448.

<sup>148</sup> *Doe d. Lawrie v. Dyeball*, 8 B. & C. 70; *Kitchenman v. Skeel*, 3 Ex. 49.

<sup>149</sup> Com. Dig. Damages, E. 5; *Corner v. Shew*, 4 M. & W. 163. Where the plaintiff declares upon a contract consisting of several parts, and assigns, among other breaches, one which from his own showing, could not have taken place before the action was brought, the court cannot intend that the damages, if assessed generally, were given only for that matter in the count which was actionable, and therefore will re-

verse the judgment. *Gordon v. Kennedy*, 2 Binn. 287; *Lewis v. Witham*, 2 Strange, 1185.

<sup>150</sup> *Johnson v. Mullin*, 12 Ohio, 10; *Chisom v. School District*, 19 Ohio, 289.

<sup>151</sup> *Kitchenman v. Skeel*, 3 Ex. 49.

<sup>152</sup> *Graves v. Waller*, 19 Conn. 90; *acc.*, *Leach v. Thomas*, 2 M. & W. 427; *Emblin v. Dartnell*, 12 M. & W. 830.

<sup>153</sup> *Hopkins v. Beedle*, 1 Caines, 347; *Lyle v. Clason*, 1 Caines, 581.

<sup>154</sup> Note to *Hambleton v. Veere*, 2 Saund. 169, 171.

pressly and positively averred in the declaration that the plaintiff has sustained damages for a cause arising subsequent to the commencement of his suit, or previous to his having any right of action, and the jury gives entire damages, the judgment will be arrested. But when the cause of action is properly laid, and the other matter comes in either under a *scilicet*, or is void, insensible, or impossible, and it therefore cannot be intended that the jury ever had it under their consideration, the plaintiff will be entitled to judgment.<sup>155</sup> The better mode, of course, where any difficulty of this kind is apprehended, is to assess the damages severally on each count. In such case the judgment will be arrested only on the count that is bad.<sup>156</sup>

### § 1278. Count bad in part.

So, part of a count may be bad; and in such a case,<sup>157</sup> in an action of covenant for quiet enjoyment, the plaintiff had averred by way of special damages, after setting out an eviction, that he had lost divers large sums of money expended on and about improving the premises; it was insisted that, as part of the special damage did not fall within the covenant, and the jury had assessed general damages, the whole was erroneous. But Abbott, C. J., intimated that, the whole declaration consisting of one count, *after verdict* it was to be presumed that the judge, at the trial, directed the jury to confine their attention to that part of the special damage only which was relevant to the covenant broken. So, in New York, it has been held that where a count contains two separate and distinct allegations of damages, one actionable and the other not, no motion in arrest of judgment will be sustained; for the court will intend, after verdict, that the damages were only given for the actionable part of the declaration.<sup>158</sup> \*\* So, in slander, if the words

<sup>155</sup> *Steele v. Western Inland L. N. Co.*, 2 Johns. 286.

<sup>156</sup> *Hayter v. Moat*, 2 M. & W. 56. In the case of *Gregory v. The Duke of Brunswick*, 7 Scott's N. R. 972, the jury having found a general verdict for the defendants, the court refused to award a *venire de novo* on the ground that they had not assessed damages on the issue at law.

<sup>157</sup> *Campbell v. Lewis*, 3 B. & Ald. 392.

<sup>158</sup> *Steele v. Western I. L. N. Co.*, 2 Johns. 286; *Osborn's Case*, 10 Coke, 130; *Lloyd v. Morris*, Willes R. 443; 5 Bac. Abr. 249. This rule was also followed by the New York Supreme Court. *Edwards v. Reynolds*, Hill & D. Supp. 53. But in the New York Superior Court it has been held, that

are all spoken at one time and all embraced in one count, and among them are any that will maintain the action, a verdict for the plaintiff will be good, since it will be intended that the damages are for the actionable words only, and that the others were alleged for aggravation. But if the action be for different words spoken at different times, and will lie for the one, but not for the other, a general verdict for entire damages will not be good.<sup>159</sup>

### § 1279. Joint torts.

\*In regard to the verdict, the question of severance is important in another point of view. Where several persons are jointly charged in an action of tort, as of assault, battery, and false imprisonment, and they either plead jointly, or sever in their pleas, or one suffers judgment to go by default, if the jury assesses several damages, the verdict is wrong, and the judgment will be erroneous,<sup>160</sup> for the trespass being jointly charged, and the jury finding them jointly guilty, the damages cannot be separated, and consequently the verdict should be for the amount which the most culpable ought to pay.\*\* In many cases of joint trespass and several damages given, the plaintiff is permitted to enter one joint judgment against all, assuming the largest sum assessed against any one as the damages against all, *de melioribus damnis*.<sup>161</sup> So where a joint tort had been committed, and the referee found that the plaintiffs had

where damages have been assessed by the jury in one sum upon two items of claim, on one of which plaintiff was entitled to recover, while on the other he was not, and they cannot be severed and apportioned by the appellate court, there must be a new trial, unless the plaintiff will remit the damages entirely. *Sherry v. Frecking*, 4 Duer, 452.

<sup>159</sup> *Empson v. Griffin*, 11 A. & E. 186.

<sup>160</sup> *Connecticut*: *Bostwick v. Lewis*, 1 Day, 33.

*Illinois*: *Yeazel v. Alexander*, 58 Ill. 254.

*Massachusetts*: *Kennebeck Purchase v. Boulton*, 4 Mass. 419; *Halsey v. Woodruff*, 9 Pick. 555.

*New York*: *Bohun v. Taylor*, 6 Cow. 313; *Beal v. Finch*, 11 N. Y. 128.

*Pennsylvania*: *Wakely v. Hart*, 6 Binn. 316, 319.

*Virginia*: *Crawford v. Morris*, 5 Gratt. 90.

*England*: *Salmon v. Smith*, 1 Saunders, 207, note 2; *Hill v. Goodchild*, 5 Burr. 2790; *Mitchell v. Milbank*, 6 T. R. 199; *Brown v. Allen*, 4 Esp. 158.

In *Tennessee* it was held that the plaintiff could have several judgments against joint trespassers, but only one satisfaction. *Brison v. Dougherty*, 3 Baxter, 93.

<sup>161</sup> *Halsey v. Woodruff*, 9 Pick. 555; *Fuller v. Chamberlain*, 11 Met. 503.

been damaged by one of the defendants to the amount of \$600, and by the other to the amount of \$150, it was held by the Superior Court of New York that the judgment was rightly entered against both in the larger amount.<sup>162</sup> Or the error may be cured by entering a *nolle prosequi* against one, and taking judgment against the other.<sup>163</sup>

### § 1280. Several torts by different defendants in the same suit.

\* But, on the other hand, if the charge is several, the rule is the reverse. So, in an action against divers persons found guilty of several takings or offences, damages ought to be assessed against them severally; as in trespass for battery and goods, if one be found guilty for the battery, and the other for the goods taken.

So, if against three defendants, one demurs, another makes *default*, and a third *joins* issue; on the trial several damages shall be assessed against those who demur and make *default*.<sup>164</sup> \*\*

### § 1281. Award of arbitrators.

\* It has been held in England, that where a verdict is taken at Nisi Prius, subject to the award of an arbitrator, to whom all matters in difference are referred, he cannot award a greater sum than that for which the verdict was taken. But this does not apply to the action of debt.<sup>165</sup> \*\*

<sup>162</sup> *Alabama*: *Hair v. Little*, 28 Ala. 236.

*Arkansas*: *Clark v. Bales*, 15 Ark. 452.

*Mississippi*: *Bell v. Morrison*, 27 Miss. 68.

*New York*: *O'Shea v. Kirker*, 4 Bosw. 120.

But in *Clissold v. Machell*, 26 Up. Can. Q. B. 422, it was held that if judgment were entered against two defendants upon a verdict of this nature, it must be for the smaller amount.

<sup>163</sup> *District of Columbia*: *Conner v. Cockerill*, 4 D. C. (4 Cr. C. C.) 3.

*Minnesota*: *Warren v. Westrup*, 44 Minn. 237, 20 Am. St. Rep. 578, 46 N. W. 347.

*Mississippi*: *Hardy v. Thomas*, 23 Miss. 544, 57 Am. Dec. 152.

*New York*: *Holley v. Mix*, 3 Wend. 350, 20 Am. Dec. 702.

*Canada*: *Clissold v. Machell*, 26 Up. Can. Q. B. 422.

<sup>164</sup> *Com. Dig. Damages*, E. 5; *Chapman v. House*, 2 Str. 1140. In *New York*, in an action against several, if one pleads to issue and another suffers judgment by default, damages must be assessed against both at the same time, by the jury who try the issue. *Van Schaick v. Trotter*, 6 Cow. 599.

<sup>165</sup> *Bonner v. Charlton*, 5 East, 139; *Annan v. Job*, 10 Jurist, 1083.

### § 1282. Costs.

Costs are an incident to the judgment, and cannot be allowed by the jury as damages.<sup>166</sup> And although if a jury ask what amount of damages will carry costs, there is no reason why the judge should not tell them, as it is a part of the law,<sup>167</sup> yet their having given a verdict in ignorance that it will not carry costs, is no reason why it should be disturbed after it is recorded.<sup>168</sup> And it is said that a verdict, the amount of which is adjusted by a jury for the purpose of giving or withholding costs, cannot be sustained.<sup>169</sup> So where, in an action of trespass, the jury rendered a verdict in favor of the plaintiff for costs, it was held that such a verdict and the judgment thereon were nullities; that in legal effect this was a finding in favor of the defendant, and the law carried the costs in his favor against the plaintiff.<sup>170</sup>

### § 1283. Obsolete judgment of "damage clear."

\* There was formerly, in England, a charge on the plaintiff's judgment called *damage clear*, which was a payment required to be made of twelve pence in the pound; but it seems to have been long since abolished; for, in an early case, it appears that the court thought it "hard that the plaintiffe should be estopt of his judgement till he had paid his damages cleere," and they resolved to amend it.<sup>171</sup> \*\*

### § 1284. Form of verdict.

In an action to recover money, the jury should find for the plaintiff the amount of his debt as proved, and the damages separately; and the judgment should follow the verdict. Yet where the verdict and judgment give, in an aggregate sum as damages, the amount of the debt and legal interest thereon from the time when due until the time of the verdict, if the total amount found by the verdict for damages does not exceed the principal and interest due or the sum laid as damages in the declaration, such verdict will not be held invalid, but

<sup>166</sup> Shay v. Tuolumne Water Co., 6 Cal. 286.

<sup>167</sup> Steketee v. Kimm, 48 Mich. 322.

<sup>168</sup> Kilmore v. Abdoolah, 27 L. J. Ex.

<sup>169</sup> Russell v. Weneweser, 2 Ir. R. C. L. 427, 431.

<sup>170</sup> Mangham v. Reed, 11 Ga. 137.

<sup>171</sup> Thorp's Case, March, 75.

will authorize and support a judgment for the sum in damages so found.<sup>172</sup> In South Carolina, where in debt on a bond, the jury, in finding for the plaintiff on the general issue, assess the damages (as, under the practice there, is proper), and allow the plaintiff only the principal sum due, but not the interest, to which he is entitled, his only remedy is by appeal. Judgment for the interest, *non obstante veredicto*, will not be allowed, nor can he collect it by marking it for collection on the *fi. fa.*<sup>173</sup>

### § 1285. Damages as affecting jurisdiction.

\* An important question as to damages with reference to pleading is presented in the United States, in regard to the jurisdiction of those courts which are prohibited from taking cognizance of any cases, unless a certain pecuniary amount is *in controversy*; as in regard to the Circuit Courts, which do not usually exercise their jurisdiction over cases involving less than five hundred dollars; and the Supreme Court of the United States, the appellate jurisdiction of which, in like manner, commences at the sum of five (formerly two) thousand dollars. And it has been frequently decided "that the damages claimed in the writ and declaration are the sum in controversy." Even if the plaintiff recover less than five hundred dollars, it cannot affect the jurisdiction of the court if a greater sum be claimed in his writ.<sup>174</sup> But on application to remove a suit from the State court, it has been intimated that the amount in the declaration is not conclusive, and that the plaintiff's affidavit may be received to controvert it.<sup>175</sup>

On a writ of error, though the verdict in the Circuit Court was for less than two thousand dollars, but more than that sum was claimed in the declaration, if the plaintiff brought error, the Supreme Court had jurisdiction (before the limit was changed); for the judgment might be reversed, and the whole amount claimed recovered.<sup>176</sup> But this is not so if the writ of error is brought by the defendant.<sup>177</sup> In such case the amount in controversy is to be decided by the sum in controversy at

<sup>172</sup> *Young v. Chandler*, 13 B. Mon. 252.

<sup>173</sup> *Gourdin v. Read*, 10 Rich. L. 217.

<sup>174</sup> *Gordon v. Longest*, 16 Pet. 97, 104, 10 L. ed. 900.

<sup>175</sup> *People v. Judges of N. Y. C. P.*, 2 Denio, 197.

<sup>176</sup> *Gordon v. Ogden*, 3 Pet. 33, 7 L. ed.

<sup>177</sup> *Smith v. Honey*, 3 Pet. 469, 7 L.



the time of the judgment, and not by any subsequent additions thereto, such as interest. The court cannot look beyond the time of the judgment, in order to ascertain whether a writ of error lies or not.<sup>178</sup>

And where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the recognized practice of the courts of the United States has been to allow the value to be given in evidence.<sup>179</sup> \*\*

In the State courts, in actions of tort, the damages claimed usually determine the jurisdiction as to amount.<sup>180</sup> But under the Indiana Code, the damages laid in the conclusion of the complaint do not enlarge the claim of the plaintiff so as to defeat the jurisdiction of a court limited in jurisdiction to a specified amount, if it appear by the statement of the plaintiff's cause of action that he cannot be entitled to recover as much as the limit within which the jurisdiction is confined.<sup>181</sup> In an action of contract it was held in Maryland that the amount recovered, not that laid in the declaration, determines the jurisdiction, and if in a court which has no jurisdiction of claims under a certain amount a verdict is returned for less than that amount, the court has no jurisdiction to proceed further with the case.<sup>182</sup>

### § 1286. Right to begin.

\* If the rules of pleading are correctly followed, the only remaining questions in regard to damages are those which come properly under the head of practice. The most important of these is that which presents itself at the trial of the cause in regard to the right to begin, as it is called; or, in other words,

ed. 744. See, also, *Wilson v. Daniel*, 3 Dall. 401; *United States v. M'Dowell*, 4 Cranch, 316; *Course v. Stead*, 4 Dall. 22; *Brown v. Barry*, 3 Dall. 365; *United States v. The Union*, 4 Cranch, 216, 2 L. ed. 600; *Peyton v. Robertson*, 9 Wheat. 527, 6 L. ed. 151; *Ritchie v. Mauro*, 2 Pet. 243, 7 L. ed. 411; *Scott v. Lunt*, 6 Pet. 349, 8 L. ed. 423; *United States v. Macdaniel*, 7 Pet. 1, 8 L. ed. 587.

<sup>178</sup> *Knapp v. Banks*, 2 How. 73, 11 L. ed. 184. See, also, *Wilson v. Sandford*, 10 How. 99, 13 L. ed. 344.

<sup>179</sup> *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810; *United States v. The Union*, 4 Cranch, 216, 2 L. ed. 600; *Course v. Stead*, 4 Dall. 22.

<sup>180</sup> *Aulick v. Adams*, 12 B. Mon. 104.

<sup>181</sup> *Collins v. Shaw*, 8 Ind. 516.

<sup>182</sup> *Rohr v. Anderson*, 51 Md. 205, 218.

in what cases does the necessity of proving damages give the plaintiff a right to open and close the cause, where the affirmative of the issue is with the defendant. The importance of this subject has been clearly stated by a judge of great experience: "It unhappily still remains of great importance to the administration of justice by a jury, that the right to begin should be correctly adjudicated on; for all who are conversant with those trials at *Nisi Prius*, in which the address of counsel may materially affect the result, well know that the issue often ultimately depends on the decision of the question, which party has a right to begin."<sup>183</sup>

In England, it has at length been settled by a rule of all the judges, that the plaintiff shall begin in all actions for personal injuries, libel, and slander though the general issue may not be pleaded, and the affirmative be on the defendant in actions of contract;<sup>184</sup> however, the subject is still involved in uncertainty. An effort has been made to make the right depend on whether the plaintiff goes for substantial relief or for nominal damages; but the point does not appear to have been yet authoritatively settled.<sup>185</sup>

"In this country," says Mr. Greenleaf, in his very valuable work on Evidence, "it is generally deemed a matter of discretion, to be ordered by the judge at the trial, as he may think most conducive to the administration of justice; but the weight of authority, as well as the analogies of the law, seem to be in favor of giving the opening and closing of the cause to the plaintiff, wherever the damages are in dispute, unliquidated, and to be settled by the jury upon such evidence as may be adduced, and not by computation alone."<sup>186</sup> This language seems to ascribe a greater discretion to the judge trying the cause, and to open the door to greater laxity than is in fact allowed. In

<sup>183</sup> Pollock, C. B., in *Ashby v. Bates*, 15 M. & W. 589, 594, where a new trial was ordered because of an erroneous ruling at *Nisi Prius* as to the right to begin. See, also, *Booth v. Millns*, 15 M. & W. 669.

<sup>184</sup> Greenleaf on Evidence, § 76, 3d ed. 149; *Mercer v. Whall*, 9 Jur. 576, 5 Q. B. 447.

<sup>185</sup> *Chapman v. Rawson*, 8 Q. B. 673; *Cannam v. Farmer*, 2 Car. & Kir. 747. In the Exchequer, the crown has the right to a general reply in all cases where the crown has an interest. *Marquis of Chandos v. Commrs. of Inland Revenue*, 20 L. J. Exch. 269.

<sup>186</sup> 1 Greenleaf on Evidence, 14th ed., § 76, p. 107, where cases will be found.

Massachusetts, it has been said, citing with approbation the language of Lord Denman, in *Mercer v. Whall*:<sup>187</sup> "Wherever, from the state of the record at Nisi Prius, there is anything to be proved by the plaintiff, whether as to the facts necessary for his obtaining a verdict, or as to the amount of damages, the plaintiff is *entitled* to begin. But where the *onus probandi* lies in the first instance on the defendant, he is entitled to begin."<sup>188</sup> So, in the same State, when in trespass the defendant pleads soil and freehold in himself, without any other plea, and issue is joined thereon, the right of opening and closing the argument before the jury belongs to the defendant.<sup>189</sup> So, in the same State, on the hearing before a jury to reassess damages for taking land for a railroad, the party claiming damages has the right to open and close, and a contrary ruling at the trial was held erroneous.<sup>190</sup> \*\*

### § 1286a. Damages on appeal.

In case of a frivolous or unnecessary appeal, damages are often allowed by statute or local practice. Thus it is a common practice for the Appellate Court to increase the judgment by 6% or 10% for a frivolous appeal, taken obviously for delay merely.<sup>191</sup>

<sup>187</sup> 5 Q. B. 447.

<sup>188</sup> *Conn. River R. R. v. Clapp*, 1 Cush. 559, 563.

<sup>189</sup> *Davis v. Mason*, 4 Pick. 156.

<sup>190</sup> *Conn. River R. R. v. Clapp*, 1 Cush. 559.

<sup>191</sup> *United States* (by rule of court): *Barrow v. Hill*, 13 How. 54, 14 L. ed. 48; *Kilbourne v. State Inst.*, 22 How. 503, 16 L. ed. 370; *Prentice v. Pickersgill*, 6 Wall. 511, 18 L. ed. 790; *Amory v. Amory*, 91 U. S. 356, 23 L. ed. 436. No damages will be allowed unless the appeal was for delay. *Cotton v. Wallace*, 3 Dall. 302. The allowance is entirely in the discretion of the court. *Boyce v. Grundy*, 9 Pet. 275, 9 L. ed. 127.

*California*: *Bell v. Camm*, 10 Cal. App. 388, 102 Pac. 225.

*Illinois*: *Minnesota M. L. I. Co. v. Link*, 230 Ill. 273, 82 N. E. 637.

*Missouri*: *Tobin v. Missouri Pac. R. R.*, 18 S. W. 996 (no damages where the appeal was in good faith).

*New York*: *Jackson v. Rochester*, 124 N. Y. 624, 26 N. E. 326.

*Pennsylvania*: *O'Donnell v. Broad*, 149 Pa. 24, 27 Atl. 305; *Martin v. Rider*, 181 Pa. 265, 37 Atl. 403.

*Texas*: *Montgomery v. Buckskin Breeches Co.* (Tex. Civ. App.), 116 S. W. 139.

*Wisconsin*: *Ramsay v. Davis*, 20 Wis. 31; *Ossouski v. Wiesner*, 101 Wis. 238, 77 N. W. 184. No damages will be allowed unless the appeal was clearly frivolous and in bad faith. *Morse v. Buffalo Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587; *Northwestern L. I. Co. v. Irish*, 38 Wis. 361.

In *Washington* the cause for award of damages must be apparent on the record. *Seattle & M. R. R. v. Joergen-*

### § 1286b. Damages on dissolution of injunction.

It has already been seen <sup>192</sup> that an injunction bond is usually required before an interlocutory injunction will be granted. Where a bond has not been required, damages may be assessed on the dissolution of a temporary injunction; these will be assessed on the same principles that regulate the damages on an injunction bond. <sup>193</sup>

son, 3 Wash. 622, 29 Pac. 88; *Walter v. Maresch*, 3 Wash. 624, 29 Pac. 205; *Wheeler v. Commercial Investment Co.*, 22 Wash. 546, 61 Pac. 715; *Hallidie Mach. Co. v. Hayden-Cœur d'Alene Irr. Co.*, 56 Wash. 11, 105 Pac. 140.

In *Kentucky* damages are allowed only in the case of money judgments which may be enforced by execution or similar process. *Worsham v. Lancaster*, 104 Ky. 813, 48 S. W. 410; *Hatfield v. Holloway*, 106 S. W. 1192.

<sup>192</sup> *Ante*, §§ 685 *et seq.*

<sup>193</sup> *Illinois*: *Dempster v. Lansingh*, 234 Ill. 381, 84 N. E. 1032 (allowance of counsel fees); *Howard v. Burke*, 248 Ill. 224, 93 N. E. 775 (counsel fees).

*Mississippi*: *Curphy v. Terrell*, 89 Miss. 624, 42 So. 235 (counsel fees).

*Tennessee*: *Collins v. Crownover*, 57 S. W. 357.

*Texas*: *Galveston, H. & S. A. Ry. v. Ware*, 74 Tex. 47, 11 S. W. 918 (expenses of dissolution); *Galveston C. R. R. v. Miller* (Tex. Civ. App.), 38 S. W. 1132 (loss of time and profits); *Hermann v. Allen* (Tex. Civ. App.), 118 S. W. 794 (delay in removal of building).

*England*: *Mansell v. British L. C. Bank*, [1892] 3 Ch. 159 (diminution in value of shares).

In *Louisiana*, by statute, damages cannot exceed 20%, which includes attorney's fees. *Schwann v. Sanders*, 121 La. 461, 46 So. 573; *Rivet v. George M. Murrell P. & M. Co.*, 121 La. 201, 46 So. 210.

## CHAPTER LVI

### EVIDENCE

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|---|---|
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| 1288. Exceptions to common-law rule excluding testimony of party. | 1299. Offers — Price-lists — Quotations—Appraisals. |
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#### § 1287. Mode of proof.

\* We have now to consider the mode of proof by which claims to damage are substantiated. The rules which govern evidence as applied to fix the measure of relief, are neither numerous nor complex, but they deserve careful attention.

We have seen that in the early stages of the civil law, the plaintiff was allowed to fix the amount of the compensation to which he conceived himself entitled, subject only to the restraining hand of the *judex*. In the common law, independently of statutory innovation, the rule was carried to the other extreme; for, as a general principle, neither party to the record was allowed to give testimony in any branch of the case. But to this rule certain exceptions were introduced.

#### § 1288. Exceptions to common-law rule excluding testimony of party.

The oath of the party was admitted by the common law, in respect of a lost deed or other paper, preparatory to the intro-

duction of secondary evidence to prove its contents. So, too, in complaints under bastardy acts, the oath of the female was admitted to charge the defendant with the paternity of the offspring. So, again, the rule was relaxed in order to prove the amount of compensation to which a party was entitled; thus, the oath of the plaintiff was admitted in many States of the Union to prove the truth of entries in his books of goods delivered in small amounts or of daily labor performed, when the party, from his situation, has no evidence but the accounts kept by himself, and where, as a general thing, from the nature of the traffic or service, he could not have. So, too, where robberies or larcenies had been committed, and no evidence existed but that of the party robbed or plundered, he has been admitted as a witness to prove his loss; for it was said that in these cases the party injured should have an extraordinary remedy *in odium spoliatoris*. On this ground, in an action against the hundred under the English statute of Winton, the person robbed was admitted as a witness to prove his loss and the amount of it.<sup>1</sup> So, in Pennsylvania, in an action against the county for the destruction of property by a mob, the plaintiff was allowed to prove ownership and the value of wearing apparel destroyed,<sup>2</sup> but not the destruction of household furniture, because there the argument *ex necessitate* did not apply.<sup>3</sup> So, also, in equity, where a man ran away with a casket of jewels, the party injured was admitted as a witness.<sup>4</sup> So, too, when the defendant, a shipmaster, broke open and plundered the plaintiff's trunk, the latter was allowed to testify to the contents of the trunk.<sup>5</sup>

An effort was made in Pennsylvania to extend the principle of these exceptions to all cases of passengers by public conveyances, where there was no criminal nor even tortious act committed by the defendant beyond mere negligence; and it was said that in such cases the plaintiff might testify from necessity.<sup>6</sup> But in Massachusetts this was denied; the old

<sup>1</sup> Bul. N. P. 187; Porter v. Hundred of Regland, Peake's Add. Cases, 203; Snow v. Eastern R. R., 12 Met. 44.

<sup>2</sup> County v. Leidy, 10 Pa. 45. See, also, Clark v. Spense, 10 Watts, 335;

M'Gill v. Rowand, 3 Pa. 451, 45 Am. Dec. 654.

<sup>3</sup> Ibid.

<sup>4</sup> East India Co. v. Evans, 1 Vern. 305.

<sup>5</sup> Herman v. Drinkwater, 1 Me. 27.

<sup>6</sup> Whitesell v. Crane, 8 W. & S. 369.

principle was adhered to, and in a case of mere negligence it was decided that the plaintiff was not competent, even though he had no other testimony as to the amount of his loss.<sup>7</sup>

In New York, the admission of the plaintiff as a witness in these cases was sanctioned by statute;<sup>8</sup> the general railroad act of that State providing where baggage was properly checked, that if not delivered on the production of the check, "the plaintiff may himself be a witness, in any suit brought by him, to prove the contents and value of said baggage."<sup>9</sup> \*\*

### § 1289. Abrogation of common-law rule.

Before the abrogation of the common-law rule, the plaintiff himself, in actions against a common carrier or innkeeper, to recover for a trunk, etc., lost, was frequently allowed, as we have seen, to prove its contents.<sup>10</sup> But in *Garvey v. Camden & Amboy Railroad*<sup>11</sup> it was held that the rule of evidence which allowed the plaintiff, in an action against a common carrier, to recover for a lost trunk, etc., to prove the value of the contents by his own oath, was confined to cases in which fraud or wrong is proved upon the defendant, and had no application to cases of loss through negligence merely. And the jury were not bound by the evidence of one of the parties to the suit in estimating the damages, though there was no other evidence before them to fix the amount.<sup>12</sup> It is one of the natural concomitants of illness and of physical injuries for the sick or injured persons to complain of pain and distress. And evidence of such complaints, in connection with other proofs of injury received, was held admissible from the necessity of the case, in an action for the injury sustained, to show its extent, etc. Such evidence did not fall within the rule which excluded declarations of a party in his own favor.<sup>13</sup>

<sup>7</sup> *Snow v. Eastern R. R.*, 12 Met. 44.

<sup>8</sup> *Laws of 1850*, c. 140, § 37.

<sup>9</sup> As to how far this provision was applicable to all the railroads existing in the State, see *Marsh v. New York & Erie R. R.*, 14 Barb. 364; *Milliman v. Oswego & Syracuse R. R.*, 10 Barb. 87.

<sup>10</sup> *Indiana*: *Doyle v. Kiser*, 6 Ind. 242.

*New York*: *Taylor v. Monnot*, 1 Abb. Pr. 325; s. c., 4 Duer, 116.

*Ohio*: *Mad River & Lake Erie Railroad v. Fulton*, 20 Ohio, 318.

<sup>11</sup> 4 Abb. Pr. 171.

<sup>12</sup> *Bee Printing Co. v. Hichborn*, 4 All. 63.

<sup>13</sup> *Caldwell v. Murphy*, 11 N. Y. 416; and see s. c. below, 1 Duer, 233; see to same effect *Massachusetts*: *Bacon v. Charlton*, 7 Cush. 581.

*Wisconsin*: *McKeigue v. Janesville*,

The original rule of the common law has been now, however, so far changed, both in England and in this country, by statute, that the decisions cited in the preceding paragraphs have little importance. In England, New York, Connecticut, and probably all other States of the Union, the rule of the common law has been abrogated, and, with more or fewer exceptions, parties are permitted to testify in chief and to all facts pertinent to the case.

### § 1290. Witness to testify to facts, not opinions.

\* Another general rule, which pervades all our law, is that the witness is to testify only to facts. He is to speak as to the facts which he has heard or seen. His opinion is not to be given;<sup>14</sup> for it is the opinion of the jury on the testimony which forms the verdict and decides the case. But to this rule, again, there are many important exceptions. So, pedigree is often proved by the hearsay of the family. So, handwriting is proved by the opinions of those familiar with the signature of the party. So, too, the witness has been allowed to state his opinion in cases of criminal conversation, to show the state of the affections of the parties.<sup>15</sup> And, on similar grounds, in cases of breach of promise of marriage. In an action of the latter description, the Supreme Court of New York said: "We do not see how the various facts upon which an opinion of the plaintiff's attachment must be grounded, are capable of specification, so as to leave it, like ordinary facts, as a matter of inference, to the jury. It is true, as a general rule, that witnesses are not allowed to give their opinions to a jury; but there are exceptions, and we think this one of them. There are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinions of witnesses on this subject must be derived from a series of instances, passing under their observation, which yet they never could detail to a jury."<sup>16</sup> So, too, evidence of this kind has been admitted in cases of insanity; but it has been pro-

68 Wis. 50; *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745.

<sup>14</sup> *Colorado: Montelius v. Atherton*, 6 Colo. 225.

*Wisconsin: Blair v. Milwaukee & P. du C. R. R.*, 20 Wis. 262.

<sup>15</sup> *Trelawney v. Colman*, 2 Starkie, 191.

<sup>16</sup> *M'Kee v. Nelson*, 4 Cow. 355.



nounced by a very able judge, "the most unsatisfactory, and the least to be depended on." <sup>17</sup> \*\* So it has been held proper to ask a contractor what the amount of his loss is and what the profit on the work would have been.<sup>18</sup>

### § 1291. Experts.

\* To the general rule that the witness' opinion cannot be received as to the amount or character of injury sustained, there are, however, some considerable exceptions. Of these, perhaps the most comprehensive and important is that which admits persons of science, or experts in any profession, to testify as to their opinion on a given state of facts relating to matters in regard to which their education gives them peculiar capacity for forming a correct judgment.<sup>19</sup>

So, in Massachusetts, on the trial of an action to recover damages for injury done to the plaintiff's garden and nursery by smoke, heat, and gas proceeding from the defendant's brick kiln, two gardeners who had much experience in raising and cultivating fruit trees, shrubs, and plants, and who had testified to the particulars of the plaintiff's injury, were allowed to give their opinion as to the amount of damage. And the court say: "It seems to us that it would be impracticable to dispense with this species of testimony, in many actions of trover for personal property, where no detail of facts could adequately inform the jury of the value of the articles. The opinion of a witness, as to the value of a horse, is much more satisfactory evidence than a detailed statement of his size, color, age, etc., to give the jury the requisite information, to enable them to assess damages for the conversion of such a horse."<sup>20</sup> So, in an action on a building contract, a mason may be asked how long, in his opinion, it would take to dry the walls of a house so

<sup>17</sup> *Clark v. Fisher*, 1 Paige, 171.

<sup>18</sup> *Elizabethtown & P. R. R. v. Pottinger*, 10 Bush, 185.

<sup>19</sup> *Folkes v. Chadd*, 3 Doug. 157.

<sup>20</sup> *Massachusetts: Vandine v. Burpee*, 13 Met. 288.

*New York: Nickley v. Thomas*, 22 Barb. 652; *Smith v. Hill*, 22 Barb. 656.

*Wisconsin: Milwaukee & Mississippi R. R. v. Eble*, 4 Chand. 72.

But in *Dunlap v. Snyder*, 17 Barb. 561, it was held that in an action for damages for killing a dog, the opinions of witnesses as to the value of the animal were not admissible. See, as to proper evidence of the value of a horse, *Carr v. Moore*, 41 N. H. 131.

as to render it fit and safe for human habitation.<sup>21</sup> \*\* A physician may testify as to the probable effect of an injury on the future health of the injured party.<sup>22</sup>

But the testimony of experts must not be given at random or on insufficient or inexact data. So, in an action against the defendants as carriers, for non-performance of a contract to carry live stock from several different places to Detroit, where the circuit judge had allowed a witness to be asked the general question, what, in his opinion, was the extra shrinkage in consequence of the delay at the several places where the cattle were loaded, and at Detroit, above what it would have been if they had gone on in the regular train, and had been unloaded on arrival, it was held, by the Supreme Court of Michigan, that, as the different portions of the stock had been on the cars without food or water for various lengths of time, they must have been quite differently affected by shrinkage, and the inquiry should have been as to each separately. The admission of the general question was erroneous.<sup>23</sup>

### § 1292. Confined to matters of art and skill.

\* But this exception is generally strictly limited to the case of experts in matters of art and skill, and is not enlarged so as to admit opinion in ordinary cases, where the jury may be supposed competent to form their judgment from the statement of the facts. Nor where the opinion necessarily degenerates into mere conjecture. So, in an action for negligently injuring and sinking a canal-boat, a boatman who knew the boat in question previous to her being injured, and swore that he had raised sunken boats and repaired them, cannot testify as to his opinion of what the damages would be from the description of the situation of the boat by the witnesses.<sup>24</sup>

In an action on the case against a railroad company for injury to the person of a passenger through the negligence of the company, evidence of loss sustained by the plaintiff in his business in consequence of the injury received, is proper to aid

<sup>21</sup> *Smith v. Gugerty*, 4 Barb. 614.

*Donough*, 21 Mich. 165, 4 Am. Rep.

<sup>22</sup> *Jones v. Utica & B. R. R.*, 40 Hun, 349.

466.

<sup>24</sup> *Paige v. Hazard*, 5 Hill, 603.

<sup>23</sup> *Michigan So. & N. I. R. R. v. Mc-*

the jury in estimating the plaintiff's damages; and for that purpose the nature of the plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it, may be shown; but the opinions of witnesses as to the amount of loss are inadmissible.<sup>25</sup> A party in the city of New York, whose property is destroyed by the order of the city officers to stop the spread of a conflagration, is entitled to an allowance to the full value of the property destroyed, without any deduction for the amount insured, and interest on it; but the opinions of bystanders, that the buildings destroyed would have been consumed by the fire if they had not been blown up, are inadmissible. It was, however, suggested that perhaps the opinion of firemen and others, having particular knowledge and experience with reference to fires, might be received.<sup>26</sup> \*\* Where, by the defendant's tort, the plaintiff's horse was caused to run away, it was held not to be proper to show by opinions of witnesses the depreciation in value of the horse caused by his running away.<sup>27</sup>

### § 1293. Opinions as to quantum of damages.

\* The general rule which requires a witness to speak to facts within his knowledge, is applied to the subject of compensation; the damage must be proved like any other fact in the cause, and no testimony amounting to mere opinion is competent.<sup>28</sup> \*\* So, in Louisiana, in a suit on a sequestration

<sup>25</sup> *Lincoln v. Saratoga & S. R. R.*, 23 Wend. 425.

<sup>26</sup> *Mayor, etc., of N. Y. v. Pentz*, 24 Wend. 668, 35 Am. Dec. 641.

<sup>27</sup> *Van Wagoner v. New York Cement Co.*, 36 Hun, 552.

<sup>28</sup> *Alabama*: *Montgomery & W. P. R. R. v. Varner*, 19 Ala. 185; *Chandler v. Bush*, 84 Ala. 102.

*Arkansas*: *St. Louis, I. M. & S. Ry. v. Freeman*, 36 Ark. 41; *Little Rock, M. R. & T. Ry. v. Haynes*, 47 Ark. 497.

*Georgia*: *Gilbert v. Cherry*, 57 Ga. 128; *Central R. R. v. Senn*, 73 Ga. 705.

*Indiana*: *Ohio & M. R. R. v. Nickless*, 71 Ind. 271; *Pittsburgh, C. & St. L. Ry. v. Hixon*, 79 Ind. 111; *Hagaman v. Moore*, 84 Ind. 496.

*Iowa*: *Whitmore v. Bowman*, 4 Greene, 148; *Harriman v. New Nonpareil Co.*, 132 Ia. 616, 110 N. W. 33.

*Kansas*: *Sharon Town Co. v. Morris*, 39 Kan. 377; *Ottawa, O. C. & C. G. R. R. v. Adolph*, 41 Kan. 600.

*Louisiana*: *Wilcox v. Leake*, 11 La. Ann. 178.

*Michigan*: *Howell v. Medler*, 41 Mich. 641.

*Nebraska*: *Fremont, E. & M. V. R. R. v. Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482; *Omaha v. Kramer*, 25 Neb. 489, 41 N. W. 295, 13 Am. St. Rep. 504; *Jameson v. Kent*, 42 Neb. 412, 60 N. W. 879.

*New York*: *Morehouse v. Mathews*, 2 N. Y. 514, 51 Am. Dec. 319; *Green*

bond, the opinion of witnesses cannot form the basis of a verdict. They should testify to facts, and from those facts the jury should find the actual damages sustained.<sup>29</sup> \* So, in New York, a witness cannot be allowed to give his opinion as to the amount of damages sustained by a party in consequence of a mill lying still.<sup>30</sup> So, the opinions of witnesses as to the amount of damages caused by the deprivation or withdrawal of water from a tavern, are inadmissible.<sup>31</sup> So, too, on ascertaining the injury caused by an alleged nuisance, a witness cannot give his opinion as to the amount of damages.<sup>32</sup> So, in an action for the breach of a covenant contained in a lease, that the defendant would not let any other mill site on the same stream, it was held not proper to admit witnesses to testify to their opinion as to the amount of damage which the plaintiffs had sustained by the erection of the rival site, and a new trial was ordered.<sup>33</sup>

The objection usually taken is that it usurps the province of the jury. It is for the jury to determine how much the property is damaged under the instructions of the court; and witnesses should always testify to facts. To answer the question how much a piece of property is "damaged" by a given injury, is a question which requires for an intelligent answer a knowledge of the rule of damages applicable in the particular case. For example, in eminent domain cases it cannot be answered without taking into consideration the question of benefits. The same property will be damaged in one amount if benefits are excluded, in another if included. Hence expert testimony as to "damage," if not absolutely excluded, should be subjected to the most rigid scrutiny.

This criticism would not apply, however, where the measure of damages is *the mere depreciation in value of property*. In

*v. Plank*, 48 N. Y. 669; *Cook v. Brockway*, 21 Barb. 331.

*Ohio*: *Cleveland & P. R. R. v. Ball*, 5 Oh. St. 568, 67 Am. Dec. 312.

*Oregon*: *Montgomery v. Somers*, 50 Ore. 259, 90 Pac. 674.

*Washington*: *Ferguson v. Tobey*, 1 Wash. 275.

*Contra, California*: *Razzo v. Varni*, 81 Cal. 289.

<sup>29</sup> *Bonner v. Copley*, 15 La. Ann. 504.

<sup>30</sup> *Doolittle v. Eddy*, 7 Barb. 75.

<sup>31</sup> *Harger v. Edmonds*, 4 Barb. 256; *Giles v. O'Toole*, 4 Barb. 261.

<sup>32</sup> *Fish v. Dodge*, 4 Denio, 311.

<sup>33</sup> *Norman v. Wells*, 17 Wend. 137, 161; *Fish v. Dodge*, 4 Denio, 311, 318.

that case a witness has without doubt the right to state the value before and after the injury; and as the depreciation is a mere matter of the subtraction of one of these values from the other, it involves no question of law. It is therefore held that where the amount of damages is merely the depreciation in value of property, a witness is not prevented from giving his opinion of the depreciation merely because the quantum of damages happens to coincide with it.<sup>34</sup> As a general rule, the opinion of a witness as to the amount of damages which a landholder will sustain by reason of the construction and use of a railroad, is not evidence.<sup>35</sup> Nor, in an action in the nature of waste, can he be asked what amount of permanent injury the premises have sustained by neglect.<sup>36</sup>

\* It has been decided in Ohio, that a person who is present during the trial of a cause, and has heard witnesses describe the manner in which a ford is injured by the erection of a dam across a stream of water below it, is not competent to give his opinion of the damages sustained by the party injured.<sup>37</sup> So, intelligent merchants, well acquainted with the plaintiff and his business, were held not competent to give an opinion as to the damage of the plaintiff in being deprived of the advantage of his own care and oversight.<sup>38 \*\*</sup>

If an opinion as to the amount of pecuniary damage is inadmissible, *a fortiori* the opinion of a plaintiff as to the amount of exemplary damages to which he thought himself entitled cannot be shown.<sup>39</sup>

<sup>34</sup> *Arkansas: Fayetteville & L. Ry. v. Combs*, 51 Ark. 324, 11 S. W. 418.

*Kansas: Topeka v. Martineau*, 42 Kan. 387.

*Kentucky: Elizabethtown & P. R. R. v. Pottinger*, 10 Bush, 185.

*Nebraska: Fremont, E. & M. V. R. R. v. Marley*, 25 Neb. 138, 40 N. W. 948, 13 Am. St. Rep. 482.

*New Hampshire: Carter v. Thurston*, 58 N. H. 104, 42 Am. Rep. 584.

*West Virginia: Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121.

*Wisconsin: Neilson v. Chicago, M. & N. W. Ry.*, 58 Wis. 516.

But it is usually held that the wit-

ness cannot state the difference in values as an estimate of the damage.

*Kansas: Clark v. Ellithorpe*, 7 Kan. App. 337, 51 Pac. 940.

*Texas: International & G. N. R. R. v. Fickey* (Tex. Civ. App.), 125 S. W. 327.

<sup>35</sup> *Atlantic & G. W. R. R. v. Campbell*, 4 Oh. St. 583.

<sup>36</sup> *Robinson v. Kinne*, 1 T. & C. 60.

<sup>37</sup> *Shepherd v. Willis*, 19 Oh. 142.

<sup>38</sup> *Lincoln v. Saratoga & S. R. R.*, 23 Wend. 431; *Norman v. Wells*, 17 Wend. 161; *Mayor, etc., of N. Y. v. Pentz*, 24 Wend. 668, 35 Am. Dec. 641.

<sup>39</sup> *Chandler v. Bush*, 84 Ala. 102, 4 So. 207.

### § 1294. Opinions of value.

Value must necessarily be proved by the opinions of witnesses. To be qualified to give an opinion of the value of property, one need not necessarily be an expert in the purchase and sale of such property; it is enough if he have a general knowledge of the value of such property.<sup>40</sup> In *Whitney v. Thacher*,<sup>41</sup> Wells, J., said: "It is not necessary, in order to qualify one to give an opinion as to values, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such as are usually relied on by men engaged in business, for the conduct of that business, that qualifies him to testify." But the opinion must be founded on reasonable grounds; where no *data* exist, no opinion can be given. So an opinion as to the value of a contemplated business which was never actually entered upon will not be received.<sup>42</sup>

What the owner would take for land cannot be shown in order to prove its value; nor should the jury be allowed to take as the value of land the amount they would sell it for if owners.<sup>43</sup>

In connection with value, an expert may state the amount of hay a meadow would probably yield,<sup>44</sup> and the amount of wood which has been cut off certain land.<sup>45</sup> An expert may give his reason for his opinion.<sup>46</sup> The opinion of an expert need not be accepted, even if there is no opposing evidence.<sup>47</sup>

<sup>40</sup> *Minnesota*: *Burger v. Northern P. R. R.*, 22 Minn. 343.

*Missouri*: *Springfield & S. Ry. v. Calkins*, 90 Mo. 538, 3 S. W. 82.

*New York*: *Joy v. Hopkins*, 5 Den. 84.

In *Idaho Western Ry. v. Columbia Conference (Ida.)*, 119 Pac. 60, it was held that a witness need not be qualified to state the value of land taken; his opportunity to acquire knowledge of values can be tested on cross-examination.

<sup>41</sup> 117 Mass. 523.

<sup>42</sup> *Wakeman v. Wheeler & W. M. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; *Reed v. McConnell*, 101 N. Y. 270, 4 N. E. 718.

<sup>43</sup> *Kiernan v. Chicago, S. F. & C. Ry.*, 123 Ill. 188, 14 N. E. 18.

<sup>44</sup> *Myers v. Charlotte*, 146 N. C. 246, 59 S. E. 674.

<sup>45</sup> *Perry v. Jeffries*, 61 S. C. 292, 39 S. E. 515.

<sup>46</sup> *Morrell v. Prieskel (N. J. L.)*, 74 Atl. 994.

<sup>47</sup> *In re Manhattan Terminal*, 120 N. Y. Supp. 465.

### § 1295. Value of lands and leases.

One familiar with a parcel of land may give his opinion of its value.<sup>48</sup> In a proceeding to take lands under the right of eminent domain, when opinion as to damages is held competent, the opinion of the owner<sup>49</sup> or of one acquainted with the value<sup>50</sup> may be given both as to the damages sustained and as to the value of the land left. So, in an action for a nuisance, an architect, acquainted with the locality, may be asked if the nuisance depreciated the value of the houses in the neighborhood.<sup>51</sup> So witnesses may give their opinions as to the value of property with and without public improvements.<sup>52</sup> In *Brown v. Providence & S. Railway*,<sup>53</sup> however, it was held improper to allow a farmer to testify as to the value of land for any but farming purposes; he could not, though acquainted with the land, testify to its value as a summer resort.

The value of land may be proved also by evidence showing the value of neighboring land.<sup>54</sup> In some jurisdictions evi-

<sup>48</sup> *United States: Montana Ry. v. Warren*, 137 U. S. 348, 34 L. ed. 681, 11 Sup. Ct. 96.

*California: San Diego L. & T. Co. v. Neale*, 78 Cal. 63.

*Illinois: White v. Hermann*, 51 Ill. 243, 99 Am. Dec. 543.

*Indiana: Lafayette v. Nagle*, 113 Ind. 425.

*Iowa: Ball v. Keokuk & N. W. Ry.*, 74 Ia. 132.

*Massachusetts: Whitman v. Boston & M. R. R.*, 7 All. 313; *Swan v. Middlesex Co.*, 101 Mass. 173.

*Minnesota: Derby v. Gallup*, 5 Minn. 119.

*New York: Clark v. Baird*, 9 N. Y. 183; *Robertson v. Knapp*, 35 N. Y. 91.

*Ohio: Cleveland & P. R. R. v. Ball*, 5 Oh. St. 568.

*Pennsylvania: Kellogg v. Krauser*, 14 S. & R. 137; *Pennsylvania & N. Y. R. R. & C. Co. v. Bunnell*, 81 Pa. 414.

<sup>49</sup> *Snow v. Boston & M. R. R.*, 65 Me. 230.

<sup>50</sup> *Indiana: Frankfort & K. R. R. v. Windsor*, 51 Ind. 238.

*Missouri: Springfield & S. Ry. v. Calkins*, 90 Mo. 538.

*New York: Argotsinger v. Vines*, 82 N. Y. 308.

*Pennsylvania: Leiby v. Clear S. W. Co.*, 205 Pa. 634, 55 Atl. 782; *Hughes v. Stevens*, 36 Pa. 320.

<sup>51</sup> *Gauntlett v. Whitworth*, 2 C. & K. 720.

<sup>52</sup> *Georgia: Americus v. Tower*, 3 Ga. App. 159, 59 S. E. 434.

*Indiana: Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156.

So as to the value of land if a contract had been completely performed. *Ironton Land Co. v. Butchart*, 73 Minn. 39, 75 N. W. 749. See *Avery v. New York C. & H. R. R. R.*, 121 N. Y. 649, 24 N. E. 20.

<sup>53</sup> 12 R. I. 238, 34 Am. Rep. 631.

<sup>54</sup> *Illinois: White v. Hermann*, 51 Ill. 243.

*Montana: Sweeney v. Montana Cent. Ry.*, 25 Mont. 543, 65 Pac. 912.

See chapter on Eminent Domain in New York.

dence of sales of neighboring land may be given;<sup>55</sup> but the contrary has been held in other jurisdictions.<sup>56</sup> In *Pittsburgh & W. Railroad v. Patterson*,<sup>57</sup> Clark, J., said:

"The selling price of lands in the neighborhood at the time, is undoubtedly a test of value, but it is the general selling price, not the price paid for particular property. The location of the land, its uses and products, and the general selling price in the vicinity are the *data* from which a jury may determine the market value. The price which, upon a consideration of the matters stated, the judgment of well-informed and reasonable men will approve is the market value. A particular sale may be a sacrifice compelled by necessity, or it may be the result of mere caprice or folly; if it be given in evidence it raises an issue collateral to the subject of inquiry, and these collateral issues are as numerous as the sales."

In estimating the value of land at a given time, evidence of its value six or seven months later is not inadmissible. The law has no presumptions on the subject of changeable values of real estate, and such proof, though liable to be overcome by evidence of a previous change in the interval is not too remote.<sup>58</sup> In *Brown v. Calumet River Railway*,<sup>59</sup> the price paid for a parcel of land several years before was held admissible, as throwing some light on its present value. A resale of the land is evidence of its value.<sup>60</sup> In *Winnisimmet Co. v. Grueby*<sup>61</sup> it was held that in assessing damages for land taken, evidence

<sup>55</sup> *Alabama*: *Massey v. Fain*, 55 So. 936.

*Illinois*: *Albertson Co. v. Chicago*, 111 Ill. 651; but evidence cannot be admitted of what a company taking land by eminent domain has paid for other takings. *Chicago & A. R. R. v. Scott*, 225 Ill. 352, 80 N. E. 404.

*Iowa*: *Cummins v. Des Moines & S. L. Ry.*, 63 Ia. 397.

*Massachusetts*: *Paine v. Boston*, 4 All. 168; *Benham v. Dunbar*, 103 Mass. 365; *Gardner v. Brookline*, 127 Mass. 358; *Roberts v. Boston*, 149 Mass. 346, 21 N. E. 668.

<sup>56</sup> See *Bunke v. New York T. Co.*, 188 N. Y. 600, 81 N. E. 1161, affirming

110 App. Div. 241, 97 N. Y. Supp. 66; *Bradshaw v. Rome, W. & O. R. R.*, 1 N. Y. Supp. 691, 49 Hun, 605.

<sup>57</sup> 107 Pa. 461, 464.

<sup>58</sup> *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165. But evidence may not be introduced to show an offer for a part of the land which was withdrawn after the trespass complained of. *Western U. T. Co. v. Ring*, 102 Md. 677, 62 Atl. 801.

<sup>59</sup> 125 Ill. 600.

<sup>60</sup> *Massachusetts*: *Brigham v. Evans*, 113 Mass. 538.

*England*: *Engell v. Fitch*, L. R. 4 Q. B. 659.

<sup>61</sup> 111 Mass. 543.



could not be introduced of the amount for which an owner of neighboring land offered to sell his land, as evidence of the value of defendant's land.<sup>62</sup> And where the amount for which neighboring land had been sold was shown, evidence that the purchaser had at once been offered an advance was held inadmissible.<sup>63</sup> But in *Dalrymple v. Hannum*<sup>64</sup> the plaintiff was allowed to introduce evidence of an unaccepted offer made by him to the defendant, which the defendant refused to accept, to show of how little value the land was.

In proving the value of a lease, evidence of the amount of rent in preceding years is admissible.<sup>65</sup> And in an action of ejectment the net receipts of the defendant under a lease of the premises is evidence on the question of the value of the use and occupation.<sup>66</sup> In the latter case the court said:

"As an item of evidence on the question of the value of the use and occupation of the farm, it was competent to prove what sum was actually received from it as rent. This, of course, was not conclusive evidence of the value of the use of the farm, but it was competent evidence on the subject. The agreed rent would be strong evidence of the real value of the use and occupation.<sup>67</sup> It is from prices offered, agreed upon and paid, that the value of property or of its use is to be determined, and such prices may be given in evidence to test the correctness and fairness of opinions. Indeed, opinions are made up either from public or private sales and contracts, as regards the value of property. Thus it is, that both public and private sales of property are admissible in evidence to determine its true value."<sup>68</sup>

Circumstances may be shown for their effect on the value.<sup>69</sup> Where crops, fixtures or improvements are destroyed or removed, evidence of their value in place may be received.<sup>70</sup>

<sup>62</sup> *Acc.*, *Montclair Ry. v. Benson*, 36 N. J. L. 557.

<sup>63</sup> *Roberts v. Boston*, 149 Mass. 349, 21 N. E. 668.

<sup>64</sup> 54 N. Y. 654.

<sup>65</sup> *Fogg v. Hill*, 21 Me. 529. See *Bunke v. New York Telephone Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66.

<sup>66</sup> *More v. Deyoe*, 22 Hun, 208.

<sup>67</sup> Citing *Cary v. Gruman*, 4 Hill, 625, 40 Am. Dec. 299.

<sup>68</sup> *More v. Deyoe*, 22 Hun, 208, 222.

<sup>69</sup> *Kansas: Omaha H. & G. Ry. v. Doney*, 3 Kan. App. 515, 43 Pac. 831 (inconvenience of approach).

*Minnesota: Hueston v. Mississippi & R. R. B. Co.*, 76 Minn. 251, 79 N. W. 92 (nature and amount of items).

<sup>70</sup> *California: Greenbaum v. Taylor*,

The valuation placed on land by assessors for the purpose of the tax levy cannot be shown.<sup>71</sup>

### § 1296. Of chattels—Opinions of value.

When the value of a chattel is to be proved, one familiar with that kind of property may state his opinion as to its value.<sup>72</sup> So, one familiar with the value of horses may state the difference in value of a horse as it was represented to be and as it was,<sup>73</sup> or before and after the injury complained of.<sup>74</sup> Where a pearl had been lost, one witness was allowed to describe it, and another, who was acquainted with gems, was allowed to state his opinion of its value.<sup>75</sup> To ascertain the value of certain tobacco, a witness was allowed to testify as to the general market value of tobacco produced that year, although he admitted that he could not tell the value of the particular tobacco without seeing it.<sup>76</sup> On the other hand, in an action on an undertaking given on procuring an attachment, it was held that the evidence of witnesses who did not know the goods attached was not admissible where they merely testified as to what would be the value of similar goods when returned after five days' detention, if when taken they were worth

102 Cal. 624, 36 Pac. 957 (saloon fixtures).

*Indiana:* Huber v. Beck, 6 Ind. App. 484, 33 N. E. 985.

*Kansas:* Chicago, R. I. & P. Ry. v. Mosher, 76 Kan. 599, 92 Pac. 554 (growing trees and hedges).

*Texas:* Smith v. Frio County (Tex. Civ. App.), 66 S. W. 711 (house and fence).

<sup>71</sup> *Illinois:* Lewis v. Englewood El. R. R., 223 Ill. 223, 79 N. E. 44.

*Massachusetts:* Anthony v. New York P. & B. R. R., 162 Mass. 544, 37 N. E. 780.

<sup>72</sup> *Alabama:* Western Ry. v. Lazarus, 88 Ala. 453, 6 So. 877.

*Illinois:* Ohio & M. R. R. v. Taylor, 27 Ill. 207.

*Iowa:* Anson v. Dwight, 18 Ia. 241.

*Massachusetts:* Patton v. Bell, 141 Mass. 197, 5 N. E. 300.

*Michigan:* Browne v. Moore, 32 Mich. 254.

*Mississippi:* Whitfield v. Whitfield, 40 Miss. 352.

*Nebraska:* Hespen v. Union Pac. R. R., 82 Neb. 495, 118 N. W. 98.

*New York:* Rogers v. Ackerman, 22 Barb. 134; McDonald v. Christie, 42 Barb. 36.

*Texas:* Texarkana & F. S. Ry. v. Bell (Tex. Civ. App.), 101 S. W. 1167.

*Wisconsin:* Erd v. Chicago & N. W. Ry., 41 Wis. 65; St. Paul Boom Co. v. Kemp, 125 Wis. 138, 103 N. W. 259.

<sup>73</sup> *Haskell v. Mitchell*, 53 Me. 468, 89 Am. Dec. 711.

<sup>74</sup> *Louisville, N. A. & C. Ry. v. Peck*, 99 Ind. 68.

<sup>75</sup> *Berney v. Dinsmore*, 141 Mass. 42, 5 N. E. 273, 55 Am. Rep. 445; *acc.*, *Davenport v. Abbott* (Tex. Civ. App.), 28 S. W. 218.

<sup>76</sup> *Draper v. Saxton*, 118 Mass. 427.

\$6,000.<sup>77</sup> A witness may testify to the relative value of two articles, although not able to testify to the actual value of either.<sup>78</sup> In *Blanchard v. New Jersey Steam Boat Co.*<sup>79</sup> the value of other vessels with which the plaintiff's vessel could be compared, was held not to be evidence of the value of the plaintiff's vessel. The cost of personal property may be proved as an element of its value;<sup>80</sup> but only if accompanied by evidence of other circumstances.<sup>81</sup> In the case of animals, evidence of pedigree may be produced as bearing on their value.<sup>82</sup> Evidence of value, not on the actual date, but within a reasonable time before and after the date may be received, the distance from the date going only to the weight of the testimony.<sup>83</sup> Where the value of use of property is an element of recovery, one who has the necessary knowledge may give his opinion of the value.<sup>84</sup>

Where the value of a large number of similar articles is in question, the average value may be shown.<sup>85</sup>

### § 1297. Market value.

It is proper to ask the value of articles, although the question does not require the market value to be stated.<sup>86</sup> If there is no market for an article at the place where its value is to be

<sup>77</sup> *Alexander v. Jacoby*, 23 Oh. St. 358.

<sup>78</sup> *Kronschnable v. Knoblauch*, 21 Minn. 56.

<sup>79</sup> 59 N. Y. 292.

<sup>80</sup> *California: Angell v. Hopkins*, 79 Cal. 181.

*Pennsylvania: Arnold v. Blabon*, 147 Pa. 372, 23 Atl. 575.

<sup>81</sup> *Kentucky: Gray v. Henry County*, 19 Ky. 885, 42 S. W. 333.

*New York: Brooke v. Cunard S. S. Co.*, 93 N. Y. Supp. 369.

<sup>82</sup> *Michigan: Parker v. Lake Shore & M. S. Ry.*, 93 Mich. 607, 53 N. W. 834 (colt).

*Mississippi: Richmond & D. R. R. v. Chandler*, 13 So. 267 (bull).

*Tennessee: Citizens' R. T. Co. v. Dew*, 100 Tenn. 317, 45 S. W. 790 (dog).

*Texas: Pacific Exp. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 49 S. W. 898 (hog).

*Vermont: Winchell v. National Exp. Co.*, 64 Vt. 15, 23 Atl. 728 (dog).

<sup>83</sup> *Michigan: Connor v. Levinson*, 15 Mich. 297, 73 N. W. 232 (one day).

*Oregon: Singer v. Pearson-Page Co.*, 115 Pac. 158.

*Vermont: Griffin v. Martel*, 77 Vt. 19, 58 Atl. 788 (16 months); *McKenzie v. Boutwell*, 79 Vt. 383, 65 Atl. 99 (one year).

<sup>84</sup> *Kansas: Kennett v. Fickel*, 41 Kan. 211.

*New York: McSorley v. Faulkner*, 18 N. Y. Supp. 460.

<sup>85</sup> *Illingworth v. Greenleaf*, 11 Minn. 235.

<sup>86</sup> *Parks v. Morris A. & T. Co.*, 54 N. Y. 586.

determined, the general rule is to ascertain its value at the nearest place affording a market.<sup>87</sup> So where the value of lumber at Detroit was the measure of damages, and the witness a dealer in lumber at Wayne, a place eighteen miles from Detroit, knew the market value of such lumber at Wayne, but not at Detroit, but knew the value at Detroit was higher than at Wayne, his evidence of the value at Wayne was held proper.<sup>88</sup> So evidence of the cost of the goods in the market where they were purchased, adding the expenses of transportation, the duties, and a fair allowance for profits, and also evidence of the sales of like articles for several months before and after the sale in question, and of the repurchase of some of the goods for cash by the plaintiff at advanced rates within two months afterwards, was held admissible.<sup>89</sup> So if the market price at the time of loss cannot be proved, the market price a few days before or after that time may be shown.<sup>90</sup> A witness who has inquired as to the value in the market has been allowed to state the value.<sup>91</sup> Evidence of sales of an article like the one to be delivered is admissible to show that there is a market.<sup>92</sup>

### § 1298. Evidence of sales.

If sales of property are adduced as evidence of value, they should be sales in the regular course of business.<sup>93</sup> But a sale of the very article the value of which is in question may be

<sup>87</sup> *Alabama*: South & N. A. R. R. v. Wood, 72 Ala. 451.

*Kansas*: Hanson v. Lawson, 19 Kan. 201.

*Maine*: Washington Ice Co. v. Webster, 68 Me. 449.

*Nebraska*: Keith v. Tilford, 12 Neb. 271, 11 N. W. 315.

*Virginia*: McCormick v. Hamilton, 23 Gratt. 561.

Evidence of cost and transportation charges cannot be received to prove market value. *Gensburg v. Field*, 104 Ia. 599, 74 N. W. 3.

<sup>88</sup> *Savercool v. Farwell*, 17 Mich. 308.

<sup>89</sup> *Eaton v. Mellus*, 7 Gray, 566.

<sup>90</sup> *Massachusetts*: *Eaton v. Mellus*, 7 Gray, 566.

*New York*: *Dana v. Fiedler*, 12 N. Y. 40, 62 Am. Dec. 130.

*West Virginia*: *Boyd v. Gunnison*, 14 W. Va. 1.

Evidence of market value nine months previous is incompetent. *Galveston H. & S. A. Ry. v. Williams* (Tex. Civ. App.), 25 S. W. 1019.

<sup>91</sup> *Colorado*: *Thatcher v. Kaucher*, 2 Colo. 698.

*Texas*: *Gulf, C. & S. F. Ry. v. Patterson*, 5 Tex. Civ. App. 523, 24 S. W. 349.

<sup>92</sup> *DeWolf v. McGinnis*, 106 Ill. 553.

<sup>93</sup> *Kansas*: *Meixell v. Kirkpatrick*, 33 Kan. 282.

*New Hampshire*: *White v. Concord R. R.*, 30 N. H. 188.

shown in evidence of its value,<sup>94</sup> though the sale were a sheriff's sale;<sup>95</sup> and therefore evidence of the cost of the goods is admissible, in connection with other circumstances.<sup>96</sup> So where goods were damaged at sea, evidence of the price brought by the damaged goods at auction upon their arrival was held admissible.<sup>97</sup> So, in *Tompkins v. Kanawha Board*,<sup>98</sup> it was held that where goods were to have been sold at an agreed price at the place where their value is to be taken, such agreed price is evidence of their value. In *Luse v. Jones*,<sup>99</sup> in trespass for removing the plaintiff's furniture and interfering with her business as a boarding-house keeper, it was held that, although the furniture was not new, evidence of the price at which a regular dealer sold such articles was admissible as an item in estimating the value. In *Jones v. Morgan*,<sup>100</sup> in estimating the value of household furniture, works of art, and ornaments, the plaintiff was allowed to state the price paid for the articles. The court said:

Prices realized at forced sales cannot be shown. *Lincoln v. Packard* (Tex. Civ. App.), 60 S. W. 682.

<sup>94</sup> *United States: Clews v. Jamieson*, 182 U. S. 461, 21 Sup. Ct. 845, 45 L. ed. 1183 (auction).

*Connecticut: Lyon v. Katten*, 80 Conn. 718, 69 Atl. 534 (sales a few months later).

*Maine: Norton v. Willis*, 73 Me. 580.

*Massachusetts: Baker v. Seavey*, 163 Mass. 522, 40 N. E. 863, 47 Am. St. Rep. 475 (auction).

*Michigan: Gates v. Comstock*, 113 Mich. 127, 71 N. W. 515 (price plaintiff paid for the land).

*Nebraska: Imhoff v. Richards*, 48 Neb. 590, 595, 67 N. W. 483 (auction).

*New York: Parmenter v. Fitzpatrick*, 135 N. Y. 190, 31 N. E. 1032 (private sales of stock of stable; value a year later).

But in *Rector-Wilhelmy Co. v. Nissen*, 35 Neb. 716, 53 N. W. 670, the amount brought by goods at a forced mortgagee's sale was not allowed to be considered.

<sup>95</sup> *New York: McIlhargy v. Cham-*

*bers*, 117 N. Y. 532, 23 N. E. 561; *Montignani v. E. V. Crandall Co.*, 34 App. Div. 228, 54 N. Y. Supp. 517; *Industrial & General Trust v. Tod*, 52 App. Div. 195, 64 N. Y. Supp. 1093. *Utah: White v. Pease*, 15 Utah, 170, 49 Pac. 416.

*Vermont: Hildreth v. Fitts*, 53 Vt. 684.

*Contra, Pennsylvania: Sweigert v. Finley*, 144 Pa. 266, 22 Atl. 702.

<sup>96</sup> *United States: The Lucille*, 169 Fed. 719.

*New York: Behm v. Damm*, 91 N. Y. Supp. 735.

*Vermont: Griffin v. Martel*, 77 Vt. 19, 58 Atl. 788.

But the price paid two years before for a machine which had since that time been used and injured was held not admissible in *Hensley v. Orendorff*, 152 Ala. 599, 44 So. 869.

<sup>97</sup> *Guiterman v. Liverpool, N. Y. & P. S. S. Co.*, 83 N. Y. 358.

<sup>98</sup> 21 W. Va. 225.

<sup>99</sup> 39 N. J. L. 707.

<sup>100</sup> 24 Hun, 372.

"If the plaintiff had been restricted to direct proof of the value of the property at or near that time, it is evident that no redress could possibly be afforded for the injury and loss which she had sustained. For that reason it was a matter of strict necessity that evidence of a different character should be produced and relied upon, not as controlling in the case, but as a basis from which, in view of succeeding circumstances, a fair valuation of the property might be ascertained. . . . What is required is that reliable and satisfactory evidence shall be produced from which the value of the property in controversy may be ascertained with a reasonable degree of certainty."

### § 1299. Offers—Price-lists—Quotations—Appraisals.

A mere offer to sell or buy at a certain price, unaccepted, cannot be shown as evidence of value.<sup>101</sup> But offers made in open market are evidence of value,<sup>102</sup> such as statements of dealers in answer to inquiries as to price,<sup>103</sup> or price-lists of manufacturers or dealers.<sup>104</sup> So the official quotations of the exchanges are admissible. Thus, in *Whitney v. Thacher*<sup>105</sup> brokers in Boston, members of a firm doing business and having houses established in Boston and New York, who were familiar with the market value of such goods in New York, and whose information was derived from the daily price current lists and from the return of sales daily furnished them in Boston from New York, were allowed to testify as to the value in New York. Wells, J., said: "An unaccepted offer, as an isolated transaction, is not competent evidence upon the question of value. But in a market regularly attended by buyers and sellers, an offer as well as a sale of an article of recognized uni-

<sup>101</sup> *Maine*: *Norton v. Willis*, 73 Me. 580 (*semble*).

*Michigan*: *Thompson v. Moiles*, 46 Mich. 42.

*Nebraska*: *Winside State Bank v. Lound*, 52 Neb. 469, 72 N. W. 486.

*New Jersey*: *Hartman v. Dobar*, 80 N. J. L. 250, 76 Atl. 347.

*Texas*: *Texas & P. Ry. v. Randle*, 18 Tex. Civ. App. 348, 44 S. W. 603.

*Wisconsin*: *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432.

<sup>102</sup> *Norton v. Willis*, 73 Me. 580 (*semble*).

<sup>103</sup> *Harrison v. Glover*, 72 N. Y. 451 (*semble*).

<sup>104</sup> *United States*: *Cliquot's Champagne*, 3 Wall. 114, 18 L. ed. 116.

*New York*: *Harrison v. Glover*, 72 N. Y. 451. But *contra*, *Cook County v. Harms*, 10 Ill. App. 24.

<sup>105</sup> 117 Mass. 523.

form character, constantly bought and sold in that market, so as to have a place upon the daily price current lists, may serve to show that the market value of that article did not then exceed the price at which it was offered. It is admissible because of its publicity, and the presumption of the presence of dealers ready to purchase, and who would have done so if the offer had been below the market value. That dealers are themselves guided in their transactions by such indications of the state of the market, makes the fact one that may properly be considered in evidence." In New York it has been held that the "Shipping and Commercial Lists Prices Current" are not admissible to show value unless supported by testimony as to when and how the list was made up; <sup>106</sup> and this requirement would seem to be sound and reasonable. In Michigan, however, the market quotations of a Toledo newspaper were admitted to prove the value of shingles at that place on the day of publication; while the defendant was not allowed to prove the price at which he sold other shingles there on that day. <sup>107</sup>

The inventory and appraisal of certain goods made by a constable and his appraisers may be shown as evidence of value. <sup>108</sup>

### § 1300. Presumption against defendant.

\* In one of the earliest cases on the subject of damages in trover, <sup>109</sup> where the action was brought for a jewel, several of the trade being examined to prove what a jewel of the first water, of the size in question, would be worth, the chief-justice of the Queen's Bench directed the jury that, unless the defendant produced the jewel, and showed it not to be of the first water, "they should presume the strongest against him, and make the value of the best jewels the measure of their damages"; which they did.\*\* Where there was no evidence of the quality of cotton converted, it was held that the jury were entitled to assume it to have been of the best quality. <sup>110</sup> But

<sup>106</sup> Whelan v. Lynch, 60 N. Y. 469.

<sup>107</sup> Peter v. Thickstun, 51 Mich. 580.

<sup>108</sup> Green v. McCracken, 64 Kan. 330, 67 Pac. 857.

<sup>109</sup> Armory v. Delamirie, 1 Strange, 505.

<sup>110</sup> Curry v. Wilson, 48 Ala. 638. So in an action against a carrier for non-delivery. Bailey v. Shaw, 24 N. H. 297, 55 Am. Dec. 241.

in other forms of action, as assumpsit for goods sold, or debt for money lent, where there is no fraud in the defendant, this rule is reversed, and the jury will be instructed to presume against the plaintiff's demand. Thus, in assumpsit, in the absence of evidence as to the quality of liquor in bottles sold by the plaintiff, they were told, by Lord Ellenborough, to presume that the bottles were filled with the cheapest liquor in which the plaintiff dealt.<sup>111</sup> And, in debt, where the proof was simply that the plaintiff handed the defendant a bank note in reply to a request for money, the English Court of Exchequer held that the jury were rightly instructed to presume it to have been of the lowest denomination.<sup>112</sup>

### § 1301. Estoppel.

\* Again, the acts of the parties themselves may determine the value of the thing in controversy, and operate like an absolute liquidation of damages. So, in an action on an agreement in which the defendant acknowledged that he had received of the plaintiff certain enumerated goods, attached by the plaintiff as a deputy sheriff, estimated at fifteen hundred dollars, and which the defendant promised to keep safely and deliver to the plaintiff on demand; it was held that the defendant could not give evidence that the goods were of less value than the specified sum, but that the valuation in the receipt was conclusive.<sup>113</sup> \*\* Evidence of an offer by plaintiff to sell the property is admissible as against him, to show that it is worth no more than the amount he offered to take for it;<sup>114</sup> and an agreement by defendant to pay a certain amount for the use of land for a term preceding his trespass upon it is admissible against him as evidence of the value of the use.<sup>115</sup>

### § 1302. Value of construction.

In order to prove the value or expense of repairs on a building, evidence may be received of the value of the materials and labor required.<sup>116</sup> So, in arriving at the value of a sleigh, the

<sup>111</sup> *Clunnes v. Pezzey*, 1 Camp. 8.

<sup>112</sup> *Lawton v. Sweeney*, 8 Jur. 964.

See *Jones's Appeal*, 62 Pa. 324.

<sup>113</sup> *Jones v. Richardson*, 10 Met. 481.

<sup>114</sup> *Hersey v. Ins. Co.*, 27 N. H. 149.

<sup>115</sup> *Weaver v. Mississippi & R. R. B. Co.*, 28 Minn. 534, 11 N. W. 114.

<sup>116</sup> *Hough v. Cook*, 69 Ill. 581.



value of its component parts may be shown.<sup>117</sup> Upon the question of the value of a house or other building, one who is qualified to do so may give an estimate of the expense of building it.<sup>118</sup>

### § 1303. Of services.

The value of services may be proved by the opinion on one familiar with such value.<sup>119</sup> So the value of an attorney's services may be proved by an attorney who knows what the services were,<sup>120</sup> or upon a proper hypothetical statement.<sup>121</sup> But the value of skilled services is to be estimated not by inquiring what A. or B. would charge for such services, but what the services are fairly worth by the common usage or custom of compensation; and it is error to receive the testimony of witnesses as to what they would charge.<sup>122</sup> But evidence is proper of the price usually charged and received for similar services by others at the same place,<sup>123</sup> and of the past earnings of the person whose services are in question.<sup>124</sup> The circum-

<sup>117</sup> *Hildreth v. Fitts*, 53 Vt. 684.

<sup>118</sup> *Maine*: *Tebbetts v. Haskins*, 16 Me. 283.

*Massachusetts*: *Hills v. Home Ins. Co.*, 129 Mass. 345.

*Tennessee*: *Southern Oil Works v. Bickford*, 14 Lea, 651.

<sup>119</sup> *Alabama*: *Parker's Heirs v. Parker's Admr.*, 33 Ala. 459.

*Kansas*: *Atchison v. Rose*, 43 Kan. 605, 23 Pac. 561.

*Michigan*: *Raynowski v. Detroit B. C. & A. R. R.*, 74 Mich. 15, 41 N. W. 847.

*New York*: *Brill v. Flagler*, 23 Wend. 354, 35 Am. Dec. 572; *Lewis v. Trickey*, 20 Barb. 387.

<sup>120</sup> *Covey v. Campbell*, 52 Ind. 157.

<sup>121</sup> *Williams v. Brown*, 28 Oh. St. 547.

<sup>122</sup> *Pfeil v. Kemper*, 3 Wis. 315.

<sup>123</sup> *United States*: *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983.

*North Carolina*: *Jeffries v. Seaboard A. L. R. R.*, 129 N. C. 236, 39 S. E. 836.

*Pennsylvania*: *McKenna v. Citizens' N. G. Co.*, 201 Pa. 146, 50 Atl. 922.

*Texas*: *Missouri, K. & T. Ry. v. Lasater*, 53 Tex. Civ. App. 51, 115 S. W. 103.

*Vermont*: *Vilas v. Downer*, 21 Vt. 419.

<sup>124</sup> *California*: *Bonneau v. North Shore R. R.*, 152 Cal. 406, 93 Pac. 106.

*Iowa*: *Lund v. Tyler*, 115 Ia. 236, 88 N. W. 333.

*Kansas*: *Chicago, R. I. & P. Ry. v. Posten*, 59 Kan. 449, 53 Pac. 465.

*New York*: *Beisiegel v. New York C. R. R.*, 40 N. Y. 9; *Palmer v. Conant*, 11 N. Y. Supp. 917, 58 Hun, 333; *Symons v. Metropolitan St. Ry.*, 27 Misc. 502, 58 N. Y. Supp. 327.

For the distinction between personal earnings and the profits of a business, not due to personal exertions, which therefore cannot be shown, see *Johnson v. Manhattan Ry.*, 52 Hun, 111, 4 N. Y. Supp. 848; *Thomas v. Union Ry.*, 18 App. Div. 185, 45 N. Y. Supp. 920.

*Ante*, § 482a.

stances and quality of the services may be shown, as bearing on the value.<sup>125</sup>

### § 1304. Other value.

One who knows the sort of board and care furnished to an insane person may testify as to its value.<sup>126</sup> In New Hampshire it was held that as evidence of the value of board the price of similar board at a hotel ten miles distant might be shown.<sup>127</sup>

The value of a business may be shown by evidence of the extent of the business and the amount of profits.<sup>128</sup>

### § 1305. Evidence of malice or intention.

All facts directly bearing on the question of malice can be given in evidence. In *Voltz v. Blackmar*<sup>129</sup> it was said that "where exemplary or punitive damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence." The action was for false imprisonment, and it was held that the facts which induced the defendant to make the arrest should have been considered by the jury

<sup>125</sup> *Alabama*: *Louisville & N. R. R. v. Handley*, 56 So. 539.

*Illinois*: *Graham v. Mattoon City Ry.*, 234 Ill. 483, 84 N. E. 1070 (education).

*Iowa*: *Patton v. Sanborn*, 133 Ia. 650, 110 N. W. 1032 (amount of labor performed as housewife).

*Kentucky*: *Buffalo C. C. M. Co. v. Hodges*, 98 S. W. 274, 30 Ky. L. Rep. 346 (habits of industry and sobriety).

*Michigan*: *Kingston v. Fort Wayne, etc., Ry.*, 112 Mich. 40, 45, 40 L. R. A. 131, 70 N. W. 315, 74 N. W. 230 (dissolute habits and failure to secure employment); *Herrick v. Wixom*, 121 Mich. 384, 80 N. W. 117, 81 L. R. A. 333 (habits of intoxication).

*Missouri*: *Latimer v. Metropolitan St. Ry.*, 126 Mo. App. 70, 103 S. W. 1102 (health).

*Pennsylvania*: *McKenna v. Citizens' N. G. Co.*, 201 Pa. 146, 50 Atl. 922 (amount of business attended to).

<sup>126</sup> *Kendall v. May*, 10 All. 59.

<sup>127</sup> *Cross v. Wilkins*, 43 N. H. 332.

<sup>128</sup> *California*: *Hawthorne v. Siegel*, 88 Cal. 159, 25 Pac. 1114, 22 Am. St. Rep. 291.

*Georgia*: *Juchter v. Boehm*, 67 Ga. 534.

*Illinois*: *Illinois & S. L. R. & C. Co. v. Decker*, 3 Ill. App. 135.

*Michigan*: *Keables v. Christie*, 47 Mich. 594, 11 N. W. 400.

*New York*: *Marquart v. LaFarge*, 5 Duer, 565.

*Pennsylvania*: *Pittsburgh Gauge Co. v. Ashton Valve Co.*, 184 Pa. 36, 39 Atl. 223.

See *New Jersey*: *Lonon v. Public Service Co.*, 80 N. J. L. 252, 76 Atl. 321.

<sup>129</sup> 64 N. Y. 440, 21 Am. Rep. 629. But the evidence of course must be relevant. In libel, evidence of contemporaneous publication by others is not admissible if defendant was ignorant of it at the time. *Witcher v. Jones*, 17 N. Y. Supp. 491.

as bearing on the question of malice. In an action of trespass *q. c. f.*, where the defendant's malice might be a ground of exemplary damages, it has been held, in New Hampshire, that the plaintiff, being a competent witness, might testify what his motive and purpose were in doing the acts complained of.<sup>130</sup> In *Harmon v. Harmon*<sup>131</sup> it was said that acts against which the statute of limitations had run, might be given in evidence on the question of malice. In *Currier v. Swan*,<sup>132</sup> in an action for trespass *quare clausum fregit*, it was held that the defendant could show that he and the plaintiff had had a quarrel in the afternoon, but could not show its details. The court said: "Otherwise there would have been nothing to indicate to the jury but that the house was entered for the purpose of robbery and plunder, or something of the kind. The fact of a previous affray might have some weight upon the question of the amount of damages recoverable, and might legitimately be regarded as a part of the transaction to be investigated in this suit."

### § 1306. Of the duration of life.

Where the amount of damages depends on the length of a life in being, as in the case of a lease for life or a dower right, the courts, if not by the assent of parties, usually by the rules of their practice, resort to the standard mortality or annuity tables, as the Northampton, Wigglesworth, Carlisle or American Tables.<sup>133</sup> The value of the life for a year being ascertained

<sup>130</sup> *Norris v. Morrill*, 40 N. H. 395.

<sup>131</sup> 61 Me. 233.

<sup>132</sup> 63 Me. 323.

<sup>133</sup> *United States: Colusa Parrot Mining & Smelting Co. v. Monahan*, 162 Fed. 276, 89 C. C. A. 256.

*Alabama: Southern Ry. v. Cunningham*, 152 Ala. 147, 44 So. 658.

*Delaware: McMahon v. Bangs*, 5 Pennew. 178, 62 Atl. 1098.

*Georgia: Collins Park & B. R. R. v. Ware*, 112 Ga. 663, 37 S. E. 975.

*Indiana: Pittsburgh, C., C. & S. L. Ry. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033; *Pittsburgh, C., C. & S. L. Ry. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467.

*Iowa: Chase v. Burlington, C. R. & N. Ry.*, 76 Ia. 675, 39 N. W. 196; *Scagel v. Chicago, M. & S. P. Ry.*, 83 Ia. 380, 49 N. W. 990.

*Kentucky: Greer v. Louisville & N. R. R.*, 94 Ky. 169, 21 S. W. 649; *Louisville & N. R. R. v. Campbell*, 122 S. W. 848.

*Massachusetts: Banks v. Braman*, 195 Mass. 97, 80 N. E. 799.

*Michigan: Howell v. Lansing E. Ry.*, 136 Mich. 432, 99 N. W. 406; *Haney v. Pinckney*, 155 Mich. 656, 119 N. W. 1099.

*Nebraska: Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Swift v. Holoubek*, 55 Neb. 228, 75 N. W. 584.

by the jury, the expectation of the life becomes a matter of calculation from the tables.<sup>134</sup> So in the statutory action for causing death,<sup>135</sup> or in an action for permanent personal injury.<sup>136</sup> But in *Shippen & Robbins's Appeal*,<sup>137</sup> in estimating the value of an estate by the curtesy, the court held that the Carlisle Tables were not authoritative, but that the probable expectation of life must be estimated from the particular circumstances. The tables must be proved to be standard tables, and will not otherwise be admitted;<sup>138</sup> but it has been held that the court will take judicial notice that certain tables are standard tables.<sup>139</sup> The tables are not conclusive on the jury,<sup>140</sup> but must be considered in the light of other evidence, such as the health and strength of the person in question.<sup>141</sup> Life tables need not be introduced at all. The jury may find the probable

*New York:* *Hall v. Germain*, 59 Hun, 626, 14 N. Y. Supp. 5.

*Oklahoma:* *Shawnee v. Slankard*, 116 Pac. 803.

*Pennsylvania:* *Campbell v. York*, 172 Pa. 205, 33 Atl. 879; *Kerrigan v. Pennsylvania R. R.*, 194 Pa. 98, 44 Atl. 1069.

*Texas:* *Galveston H. & S. A. Ry. v. Leonard* (Tex. Civ. App.), 29 S. W. 955; *Gulf, C. & S. F. Ry. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 255; *Missouri, K. & T. Ry. v. McGlamory* (Tex. Civ. App.), 34 S. W. 359; *Gulf, C. & S. F. Ry. v. Mangham*, 95 Tex. 413, 67 S. W. 765; *San Antonio & A. P. Ry. v. Moore*, 31 Tex. Civ. App. 371, 72 S. W. 226.

*Washington:* *Hodd v. Tacoma*, 45 Wash. 436, 88 Pac. 842; *Suell v. Jones*, 49 Wash. 582, 96 Pac. 4.

*Wisconsin:* *Waterman v. Chicago & A. R. R.*, 82 Wis. 613, 52 N. W. 247; *Hackett v. Wisconsin Cent. Ry.*, 141 Wis. 464, 124 N. W. 1018.

<sup>134</sup> *How v. How*, 48 Me. 428.

<sup>135</sup> *Georgia:* *Georgia R. R. & B. Co. v. Oaks*, 52 Ga. 410; *Central R. R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

*Wisconsin:* *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298.

<sup>136</sup> *Georgia:* *Atlanta & W. P. R. R.*

*v. Johnson*, 66 Ga. 259; *Northeastern R. R. v. Chandler*, 84 Ga. 37, 10 S. E. 586.

*Iowa:* *Coates v. Burlington, C. R. & N. Ry.*, 62 Ia. 487, 17 N. W. 760.

*Nebraska:* *Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41.

*Texas:* *Texas M. Ry. v. Douglass*, 69 Tex. 694.

<sup>137</sup> 80 Pa. 391.

<sup>138</sup> *Banks v. Braman*, 195 Mass. 97, 80 N. E. 799.

<sup>139</sup> *Pittsburg, C., C. & S. L. Ry. v. Sudhoff*, 173 Ind. 314, 90 N. E. 467.

<sup>140</sup> *United States: Kountz v. Toledo, S. L. & W. R. R.*, 189 Fed. 494.

*Montana:* *Robinson v. Helena L. & Ry.*, 38 Mont. 222, 99 Pac. 837.

*Pennsylvania:* *Kerrigan v. Pennsylvania R. R.*, 194 Pa. 98, 44 Atl. 1069; *Pauza v. Lehigh V. C. Co.*, 231 Pa. 577, 80 Atl. 1126.

See *ante*, § 485a.

<sup>141</sup> *Iowa:* *Peterson v. Brackey*, 143 Ia. 71, 119 N. W. 967 (habits of intoxication).

*Michigan:* *Denman v. Johnston*, 85 Mich. 387, 48 N. W. 565.

*Rhode Island:* *Colbert v. Rhode Island Co.*, 67 Atl. 446.

duration of life entirely from other evidence,<sup>142</sup> such as the age reached by the person's ancestors.<sup>143</sup>

### § 1307. Of pain.

The fact of death by drowning is enough of itself to prove both physical and mental pain.<sup>144</sup> When physical or mental pain is to be proved affirmatively, evidence of the acts and exclamations of the sufferer are competent evidence.<sup>145</sup> Thus, in an action for breach of promise of marriage, the plaintiff's father was allowed to testify that after the defendant left her, she became more melancholy, possessed less life and animation, and was found weeping.<sup>146</sup> Extraneous occurrences have been held inadmissible to prove special susceptibility to mental suffering;<sup>147</sup> but on the other hand it has been held proper to show that plaintiff is a Christian Scientist, as tending to show insensibility, if he chooses, to physical and mental pain.<sup>148</sup>

Evidence that the injury can be cured by a slight operation is admissible.<sup>149</sup>

### § 1308. Of a former verdict.

The jury should not be told the amount of a former verdict

<sup>142</sup> *Minnesota*: *Deisen v. Chicago*, S. P., M. & M. Ry., 43 Minn. 454, 45 N. W. 864.

*Pennsylvania*: *Benson v. Altoona & L. V. E. Ry.*, 228 Pa. 290, 77 Atl. 492.

*Texas*: *Missouri V. B. & I. Co. v. Ballard*, 53 Tex. Civ. App. 110, 116 S. W. 93.

<sup>143</sup> *Haynes v. Waterville & O. St. Ry.*, 101 Me. 335, 64 Atl. 614.

<sup>144</sup> *Clark v. Manchester*, 64 N. H. 471. And where physical pain is proved mental suffering need not be shown by independent evidence. *International & G. N. R. R. v. Mitchell*, (Tex. Civ. App.), 60 S. W. 996.

<sup>145</sup> *Iowa*: *Patton v. Sanborn*, 133 Ia. 650, 110 N. W. 1032.

*Massachusetts*: *Bacon v. Charlton*, 7 Cush. 581.

*Michigan*: *Jones v. Portland*, 88 Mich. 598, 50 N. W. 731.

*New York*: *Caldwell v. Murphy*, 11 N. Y. 416.

*North Carolina*: *Bowen v. Seaboard A. L. Ry.*, 60 S. E. 898.

*Texas*: *Missouri, K. & T. Ry. v. Zweiner* (Tex. Civ. App.), 38 S. W. 375; *Missouri, K. & T. Ry. v. Linton* (Tex. Civ. App.), 141 S. W. 129.

*Wisconsin*: *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *King v. Oshkosh*, 75 Wis. 517, 44 N. W. 745; *Keller v. Gilman*, 93 Wis. 9, 66 N. W. 800.

<sup>146</sup> *Tobin v. Shaw*, 45 Me. 331, 71 Am. Dec. 547.

Acc., in a case of personal injury: *Gulf, C. & S. F. Ry. v. Moore*, 28 Tex. Civ. App. 603, 68 S. W. 559.

<sup>147</sup> *Tingley v. Times Mirror Co.*, 151 Cal. 1, 89 Pac. 1097.

<sup>148</sup> *Fort Worth & D. C. Ry. v. Travis*, 45 Tex. Civ. App. 117, 99 S. W. 1141.

<sup>149</sup> *Leitzell v. Delaware, L. & W. R. R.* (Pa.), 81 Atl. 542.

in the case, and if told they should be cautioned to disregard it.<sup>150</sup> Nor can they be informed of the amount of the verdict in another similar case.<sup>151</sup>

### § 1309. Physical examination.

The court has discretion to order a witness to so some physical act before the jury, such as walking across the room.<sup>152</sup> An injured party may exhibit his wounds to the jury,<sup>153</sup> and such is probably the actual practice everywhere, at least in the case of ordinary injuries. The case commonly cited in support of the proposition does not go so far.<sup>154</sup> In that case the injured party was allowed to exhibit his wounds to a surgeon who was testifying, though the defendant objected that the jury might see them, and be influenced thereby. But a case in the Superior Court of New York decides that the injury may be exhibited to the jury.<sup>155</sup>

An interesting question has recently arisen as to the right of the court to compel the injured party to submit to an examination by physicians. The right was contested on the ground that it was an indignity to the injured party, but the doctrine seems now to be well settled in several jurisdictions that the court may in its discretion compel him to submit to a reasonable and proper examination by disinterested physicians.<sup>156</sup> In other jurisdictions, however, the court has no

<sup>150</sup> *Ball v. Keokuk & N. W. Ry.*, 74 Ia. 132, 37 N. W. 110.

<sup>151</sup> *Baldwin's Appeal*, 44 Conn. 37.

<sup>152</sup> *Hatfield v. St. Paul & D. R. R.*, 33 Minn. 130, 22 N. W. 176.

<sup>153</sup> *Iowa: Schroeder v. Chicago, R. I. & P. Ry.*, 47 Ia. 375; *Faivre v. Mander-schied*, 117 Ia. 724, 90 N. W. 76.

*Michigan: French v. Wilkinson*, 93 Mich. 322, 53 N. W. 530 (cannot show several years after the accident without evidence to show how far changed).

*Texas: Jackson v. Wells*, 13 Tex. Civ. App. 275, 35 S. W. 528.

<sup>154</sup> *Mulhadeo v. Brooklyn City R. R.*, 30 N. Y. 370.

<sup>155</sup> *Jordan v. Bowen*, 46 N. Y. Super. Ct. 355.

<sup>156</sup> *United States: Chicago & N. W.*

*Ry. v. Kendall*, 167 Fed. 62, 93 C. C. A. 422.

*California: Johnston v. Southern Pac. Co.*, 150 Cal. 535, 89 Pac. 348.

*Iowa: Schroeder v. Chicago, R. I. & P. Ry.*, 47 Ia. 375.

*Kansas: Atchison, T. & S. F. R. R. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252; *Atchison, T. & S. F. Ry. v. Palmore*, 68 Kan. 545, 75 Pac. 509.

*Kentucky: Keller v. Berry*, 121 S. W. 1009 (must be by impartial physician).

*Maryland: United R. & E. Co. v. Cloman*, 107 Md. 681, 69 Atl. 379.

*Michigan: Fillingham v. Michigan United Rys.*, 154 Mich. 233, 117 N. W. 635 (must be by impartial physician).

power to order such an examination without the plaintiff's consent.<sup>157</sup> In no jurisdiction will an examination be ordered if it would produce serious discomfort or injurious consequences.<sup>158</sup>

### § 1310. Approximate evidence.

\* The application of the rules which we have thus examined, in regard to the proof necessary to establish a claim for damages, often renders it difficult, if not impossible, to arrive with precise accuracy at the object of the inquiry. But justice is after all but an approximate science, and its ends are not to be defeated by a failure of strict and mathematical proof. The following language of Mr. Justice Story is full of good sense, and susceptible of frequent and wide application:

"It is said that it is difficult and indeed impracticable, to ascertain its true and exact value, when thrown overboard. There may be difficulty, and perhaps an impossibility, to ascertain its exact and minute value, for we have no means of weigh-

*Missouri*: Shamp *v.* Lambert, 142 Mo. App. 567, 121 S. W. 770.

*Wisconsin*: White *v.* Milwaukee C. Ry., 61 Wis. 536, 21 N. W. 524, 50 Am. Rep. 154.

<sup>157</sup> *Delaware*: Mills *v.* Wilmington City Ry., 1 Marvel, 269, 40 Atl. 1114.

*Illinois*: Chicago *v.* McNally, 227 Ill. 14, 81 N. E. 23, affirming 117 Ill. App. 434, 128 Ill. App. 375; Pronskevitch *v.* Chicago & A. Ry., 232 Ill. 136, 83 N. E. 545 (but if plaintiff submits his body to the jury for examination, an examination by physicians may be ordered); Kellyville Coal Co. *v.* Moreland, 121 Ill. App. 410.

*New York*: At common law; *McSwyny v. Broadway & S. A. R. R.*, 54 Hun, 637, 7 N. Y. Supp. 456 (but see *Walsh v. Sayre*, 52 How. Pr. 334); *Cole v. Fall Brook Coal Co.*, 87 Hun, 584, 34 N. Y. Supp. 572.

But by Laws of 1893, chap. 721, the court may grant the order for an examination as a matter of discovery. *Lyon v. Manhattan Ry.*, 7 Misc. 401,

27 N. Y. Supp. 966; *Wunsch v. Weber*, 29 N. Y. Supp. 1100; *Green v. Middlesex R. R.*, 10 Misc. 473, 32 N. Y. Supp. 177; *Smith v. New Jersey & H. R. R. & F. Co.*, 123 App. Div. 493, 108 N. Y. Supp. 415. The examination will not be ordered where the object of the examination was not to obtain proper discovery as to the nature of the injury. *Smyth v. Lichtenstein*, 137 App. Div. 335, 122 N. Y. Supp. 74.

*Oklahoma*: *Kingfisher v. Altizer*, 13 Okla. 121, 74 Pac. 107.

*Texas*: *St. Louis & S. W. Ry. v. Lindsey* (Tex. Civ. App.), 81 S. W. 87; *International & G. N. R. R. v. Butcher* (Tex. Civ. App.), 81 S. W. 819; *San Antonio & A. P. Ry. v. Spencer* (Tex. Civ. App.), 119 S. W. 716. The examination must be by an unprejudiced physician. *Houston & T. C. R. R. v. Berling*, 14 Tex. Civ. App. 544, 37 S. W. 1083.

<sup>158</sup> *Atchison, T. & S. F. Ry. v. Palmore*, 68 Kan. 545, 75 Pac. 509.

ing it in scales, or fixing its positive price. But the same difficulty occurs in many other cases of insurance; as in cases of injuries to sails, or rigging, or spars, by tempest, or by cutting them away in cases of jettison; and yet no one doubts that they must be contributed for according to their value, ascertained by a jury, in the exercise of a sound discretion, upon proper evidence. Suppose that fruit is insured, and the vessel has a long passage, in which, by ordinary waste and decay, it must suffer some deterioration, and then a storm occurs, in which it suffers other positive damage and injury, or there is a jettison thereof; how are we to ascertain what diminution is to be attributed to natural waste and decay, and what to the perils of the seas? or what was its true value at the time of the jettison? There can be no positive and absolute certainty. The most that can be done, is to ascertain, by the exercise of a sound judgment, what, under all the circumstances, may reasonably be attributed to one cause, and what to the other. Absolute certainty in cases of this sort is unattainable. All that we can arrive at is by an approximation thereto; and yet no man ever doubted that such a loss must be paid for if it is covered by the policy." 159 \*\*

### § 1310a. Damage imported from the circumstances.

In some cases the circumstances themselves import damage, and no independent evidence of damage need be offered.

So in actions against banks for dishonoring checks, substantial damages are recoverable without any proof of damages if the case is such that *imports* damages. In the earlier cases it was held that while for a refusal to pay money, as in case of a note, only the money due could be recovered, still if the declaration showed plaintiff to be a *trader* and the cause of action was dishonoring his check or draft, he could recover damages without proving special damage, because the fact that he was a trader imported such damage. Now, it seems to be the doctrine of the American cases that the act in itself imports injury and that special damages need not be alleged or proved in any case.<sup>160</sup> Another class of cases is nuisances;

<sup>159</sup> Rogers v. Mechanics' Ins. Co., 1 Story, 603, 609.

<sup>160</sup> Georgia: Atlanta Nat. Bank v. Davis, 96 Ga. 334, 23 S. E. 190.



in many cases of nuisances damages are given which are incapable of any estimation by evidence.<sup>161</sup>

*Illinois:* Schaffner v. Ehrman, 139 Ill. 109, 28 N. E. 917, 15 L. R. A. 135. 5 Ex. 92.

*Pennsylvania:* Patterson v. Marine Nat. Bank, 130 Pa. 419, 18 Atl. 632. Ante, § 171a.

*Tennessee:* J. M. James Co. v. Continental Nat. Bank, 105 Tenn. 1, 58 S. W. 261, 51 L. R. A. 255. <sup>161</sup> Van Fossen v. Clark, 113 Ia. 86, 84 N. W. 989; Wood, Nuisances, § 866.

## CHAPTER LVII

### COURT AND JURY

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|---|---|
| § 1311. Relative power of judge and jury.                                 | § 1318. Exemplary damages—Aggravation and mitigation.   |
| 1312. Analogies of Roman jurisprudence.                                   | 1318a. Double and treble damages.                       |
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| 1316. Former indefinite separation between province of court and of jury. | 1322. Power of jury to act without evidence of damages. |
| 1317. Present separation of functions.                                    | 1323. Wrong measure of damages adopted by jury.         |
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#### § 1311. Relative power of judge and jury.

\* As the final decision of every case involving an issue of fact is pronounced by the jury in giving their verdict, and as that verdict also expresses the amount of compensation which the party in fault is to make, it is plain that, unless the court retain to itself some control over the action of the jury, their power over the subject of remuneration would be practically unlimited. We have, then, yet to see what remedy is provided if the jury disregard the rules laid down for their government; and this necessarily brings us to a consideration of the relative powers of the judge and the jury.

#### § 1312. Analogies of Roman jurisprudence.

One of the most marked peculiarities of the Anglo-American system of jurisprudence, perhaps its most striking feature, is that division of power by which the decision of questions of law is given to the court, and that of questions of fact to the jury. It is an error to suppose that this division is altogether peculiar to our system, or that it is exclusively of English

origin. The recent labors of the German scholars, assisted by the discovery of Gaius, in 1816, have disclosed the true nature of the procedure by the *formula* in the republican period of the Roman jurisprudence; and the analogies that it furnishes on the present branch of our subject are too striking to be overlooked.

The despotism of Augustus and his successors introduced changes into the administration of justice analogous to those which it wrought in the general framework of the imperial government. Its peculiar characteristics were centralization and despotism; it established in all branches of the system a gradation of ranks, deriving their existence from and dependent upon the will of the emperor alone, and it destroyed every vestige of popular action. The first and most important of these changes in the machinery of the law was by abolishing the *judices* or jurors, to make the judges absolute masters of the whole cause, subject only to the right of appeal; which, in probably all cases, might carry the suitor before the Cæsar himself; and this led directly to the adoption of written and secret instead of oral and public discussion. Thus was produced the system which, in its general outline, ruled continental Europe almost exclusively till the adoption of the Code Napoleon.

But the plan on which justice was administered at Rome in the time of Cicero, perhaps the most truly great period of its development, was very different. The Romans during their republican epoch were too jealous of power to give to the judiciary an uncontrolled authority over questions both of law and fact. The judicial functions were divided, as with us, by an analogous and in some cases by an identical line. The suit was instituted before a magistrate, usually the prætor; and the proceedings before him were termed *in jure*. Here the cause of action was stated, the defence set up, and the issue whether of law or of fact formed. In other words, the pleadings were put in. To this issue was then joined the instructions proper for its trial, and the issue and instructions together were termed the *formula*. A *judex* or referee was then appointed. This was called *datio judicis*. The cause was then turned over to him; and he decided the question submitted to him, accord-

ing to the instructions contained in the *formula*. The proceedings before him were termed *in judicio*.

### § 1313. *Formulæ*.

The *formula* succeeded the old *legis actiones*, which, by their technical severity, had become odious. These forms were abolished, and the *formula* introduced, by the *Lex Æbutia*, the precise date of which is uncertain, but the better opinion would seem to be that it was passed early in the seventh century of the city, or not long before the period of Cicero.<sup>1</sup>

The *formulæ* were of two kinds, according as they turned on questions of law or questions of fact, *formulæ in jus conceptæ* and *formulæ in factum conceptæ*. A single instance of the latter kind will sufficiently exhibit their character: *Judex esto; si paret A. Agerium apud N. Negidium mensam argenteam deposuisse eamque dolo malo N. Negidii A. Agerio redditam non esse, quanti ea res erit tantam pecuniam judex N. Negidium A. Agerio condemnato; si non paret, absolve*. Which may be rendered thus: Let this cause be referred to——. If it shall appear that A. Agerius deposited a silver table with N. Negidius, and that through the fraud of the latter it has not been returned to the owner, let the judge condemn N. Negidius to pay to A. Agerius its value. If it shall not so appear, let him decide for the defendant. This is precisely such a charge as might be given to a jury any day in an English or American court.

There is a passage in Cicero, where, while denouncing the perversion of the administration of justice under Verres in Sicily, he gives a very striking picture of the uses and abuses of this division of the judicial functions.<sup>2</sup> “No one,” he exclaims, “can hold or recover his house, his estate, his paternal property, if, when they are sued for, a dishonest prætor, from whom there is no appeal, appoints any one whom he pleases judge; or if a profligate and worthless judge decides what the prætor orders; or if, again, the prætor so frame the order (*formula*) that not even the wisest and best judge can decide otherwise. If, for instance, he appoints L. Octavius (an unexceptionable man) *judex* with the *formula*, if it shall appear

<sup>1</sup> Gaius by Heff, cap. vii, p. 23.

<sup>2</sup> In Verr. II, l. 2, § 12.

*that the property in controversy belongs to P. Servilius, order him to deliver it to Catulus*, is not Octavius forced to compel Servilius to deliver the property to Catulus, although it do not belong to him?" This is precisely what might occur under our procedure, if the judge were corrupt; and without any corruption, it is precisely the error which the system of exceptions to the charge is intended to correct.

The *formula* thus took the place of our charge to the jury. As that charge does, it stated hypothetically the verdict or judgment to be rendered, and gave the instructions according to which the issue should be decided. The only material difference is, that it was in some cases given before the witnesses were heard. The state of facts was therefore assumed to appear correctly in the allegations of the parties; and the instructions of law arising on these facts were given before the testimony was taken. This may now appear awkward and inconvenient, but does not in principle differ from our own mode.

#### § 1314. Changes wrought by the empire.

This system was, as has been already said, effaced by the despotism of the empire. The independence of such a judiciary was, of course, hostile to that centralization which was the essence of the imperial organization; the *judices* were abolished, and the decision of the entire cause given to the court alone. This resulted in the abolition of all oral discussion; and such was the system in force at the time when the Institutes of Justinian condensed and embodied the Roman law. Such, too, was the system which was adopted when civilization resumed its progress in continental Europe, and so it remained till the French reforms introduced the jury in certain cases.

#### § 1315. Origin and development of the Anglo-Saxon judicial procedure.

In the meantime, however, in the island inhabited by that great people from whom we derive our origin, a system analogous to the Roman system in its best days had grown up; a system of unknown origin, whether a relic of Roman, or a child of German liberty, it is perhaps impossible now to say

but marked by very peculiar and distinct features, and claiming as its chief merits two great principles, oral and public discussion, and a division of the judicial functions between the court and the jury.<sup>3</sup> \*\*

### § 1316. Former indefinite separation between province of court and of jury.

\* It is very plain, from the early records of our jurisprudence, imperfect as they are, that the relative powers of the court and the jury were at first very loosely defined, and that many important changes and modifications have been from time to time introduced. So, originally, the jurors were the witnesses themselves, and found their verdict on their own knowledge of the facts. And in a very large class of cases, not falling within those in which exemplary damages may be claimed the jury exercised an almost unlimited control over the subject of remuneration. On the other hand, the court, in many cases of default and demurrer, took the disposition of the facts of the case to themselves, and pronounced the judgment. Thus, it was at one time held that the court could dispose of the case if the plea were sent to be tried in a foreign county, for the jury there had not full knowledge of the fact.<sup>4</sup> And so, where the court could increase damages, it was held they could mitigate them.<sup>5</sup> So, also, in an early author, it is said, that "though the justices use to award inquest of damages when they give judgment by default, yet they themselves may tax the damages if they will."<sup>6</sup> So, too, from another early case, where judgment was given by default, it seems clear that the judges originally

<sup>3</sup> Nor is the division of power between the magistrate and the *judex*, the only important analogy between the Roman and the English systems of jurisprudence. Two different and distinct bodies of law, as distinct and different as common law and equity with us, existed in the early days of the Roman system. *La civilization Romaine*, says Troplong, *s'est développée sous l'influence de deux élémens, qu'on pourrait en quelque sorte appeler de première et de seconde formation, et qui ont vécu*

*ensemble dans une longue alternative de lutte et de rapprochement, jusque ce que le temps ait amené leur fusion plus ou moins complète. . . . Sa formule la plus large et la plus haute c'est le jus civile et l'aquitas, sans cesse opposés l'un à l'autre, comme deux principes distincts et inégaux. De l'Influence du Christianisme sur le Droit Civil des Romains, par M. Troplong, ch. iii.*

<sup>4</sup> 1 Rol. 572, l. 50.

<sup>5</sup> 1 Rol. 572, l. 25-8; 573, l. 7.

<sup>6</sup> Viner Abr. Dam. I, 3.

might award damages without the intervention of a writ of inquiry.<sup>7</sup> So, too, on demurrer, and in actions of debt, the sum being certain, this power seems to have been exercised at a much later day.<sup>8</sup>

The following case shows the unsettled condition of the law in the respect we are now considering. A motion being made to increase damages, because the jury had only given twelve pence, whereas the plaintiff's arm was broken; Rolle, C. J., refused, because it did not appear by the declaration what manner of maiming it was that he received.<sup>9</sup> It was early decided, however, that the justices of Nisi Prius could not increase the damages,<sup>10</sup> nor the court on the certificate of the justices of Nisi Prius.<sup>11</sup> \*\* The court, at a comparatively early day, refused to increase the damages on an affidavit of all the jurors, that they had thought the effect of their verdict would be to give the plaintiff more than it did, when the application was made "at a distance of time after trial."<sup>12</sup>

In certain cases, however, the power of the court over the verdict was allowed. So, in some instances, on bills of exchange, the court assessed the damages without the intervention of a jury.<sup>13</sup> So, in case of mayhem, the courts exercised the power of altering, and even increasing the verdict. Thus, where a verdict had been found for the plaintiff of £150, and it was moved to increase the damages, Lee, C. J., said: "There is no doubt but the court can increase the damages in this case, even upon view of the party maimed." But they held the £150 sufficient, and discharged the rule.<sup>14</sup> By the practice which

<sup>7</sup> So says Brooke, Dam., pl. 55. *Le def. fist default et le pl' recouer' dams a iv, li. taze p. l'court et non dam. come il count, quod nota q. le court mesme taxa les Damages.*

<sup>8</sup> Bro., Dam., pl. 56: *Sur demur. in ley, le court poet agard damag sauns inquire de ceo per curiam qd. nota. Vide, also pl. 59, 68, 194. See Sayer on Damages, ch. xx, 105; Holdipp v. Otway, 2 Sand. 102; 21 Car. 2, Sayer, 107.*

<sup>9</sup> Jervis v. Lucas, Style, 345.

<sup>10</sup> 1 Rol. 573, l. 30.

<sup>11</sup> 1 Rol. 572, l. 20.

<sup>12</sup> Jackson v. Williamson, 2 T. R. 281.

<sup>13</sup> Robinson v. Reynolds, 2 Q. B. 196; Clement v. Lewis, 3 Br. & B. 297. So in New York the damage could be assessed by the clerk, on promissory notes, bills, etc., but not on the common counts nor unliquidated demands; and in regard to this, several cases have been decided. Burr v. Waterman, 2 Cow. 36, n.; Colden v. Knickerbacker, 2 Cow. 31; Rogers v. Coleman, 3 Cow. 62; Beard v. Van Wickle, 3 Cow. 335; Seeber v. Yates, 6 Cow. 40.

<sup>14</sup> Brown v. Seymour, 1 Wils. 5.

prevailed for a time, the court, in actions for injuries to the person, itself often took a view of the injury, and thereupon increased or mitigated the damages found by the jury according to its judgment.<sup>15</sup> So where in such a case a jury gave twenty marks damages, on a view in court, and information of the surgeons present, the court increased the damages, because the party lost the use of his arm.<sup>16</sup> And as lately as 1856, an appeal from the decision of the circuit judge denying a motion to increase the damages *super visum vulneris* was formally argued before the South Carolina Court of Appeals, in an action of trespass *vi et armis*, where the jury had awarded the moderate sum of \$30 for a mayhem, whereby one of the plaintiff's eyes and his right thumb were destroyed. The court held that the old common-law practice, on which the motion was founded, had been abrogated by disuse. The rule gradually developed was now long established, that in all cases sounding in damages, these damages are to be assessed by a jury under the direction of the court, and not by the court independently of the jury.<sup>17</sup> \* But the fluctuations and oscillations of the system have been gradually corrected and brought under fixed rules. The progress of time and the accumulation of experience enable us now to draw the lines of demarcation with great clearness, and the complication of the machinery disappears when carefully examined.

### § 1317. Present separation of functions.

The first leading proposition on which the whole structure of our system depends is, that the court decides all questions of law. Statutes are expounded, contracts interpreted, written instruments construed, evidence admitted or excluded, by the court and by the court alone.<sup>18</sup> And it necessarily follows from this, that if the jury disregard the instructions of the court on any question of law, their verdict will be set aside. It is by the exercise of this power alone that the control of the court over questions of law can be preserved. The

<sup>15</sup> See the cases collected in Rolle's Abr., pp. 571, 572; also, Broeke, Dam. 49, 86, 87.

<sup>16</sup> Freeman v. Trevers, 1 Rol. Abr. 572.

<sup>17</sup> McCoy v. Lemon, 11 Rich. L. 165.

<sup>18</sup> U. S. v. Hodge, 6 How. 279, 12 L. ed. 437.



correlative proposition to this is, that the jury decides all questions of fact. Where the facts are admitted, the rights of the parties must depend on a pure question of law, and they are, of course, under the control of the court; but the instant that an issue of fact is presented, the decision of the cause passes from the court to the jury. The rule giving the jury the decision of all questions of fact, if no exception were admitted, would, as has been said, effectually make the jury masters of the whole matter in controversy. Various modifications have, therefore, been introduced to it,\*\* as for instance that the discretion of the jury must be based upon facts and circumstances proved in the case,<sup>19</sup> and in some cases the rule is changed by statutory enactment. Thus, the Revised Statutes of Indiana have abrogated the common-law rule, that, in an action of tort, the court cannot assess the damages. Under that provision the right to a jury trial of the question of damages is waived by not appearing.<sup>20</sup> And, in Louisiana, the Supreme Court have power to increase the damage on appeal.<sup>21</sup> And it is well settled that provisions of law providing for the ascertainment of damages without the intervention of a jury, in the case of the taking of land under the right of eminent domain, do not violate the constitutional requirement of trial by jury.<sup>22</sup>

### § 1318. Exemplary damages—Aggravation and mitigation.

We have already seen <sup>23</sup> that the allowance and amount of exemplary damages is a question for the jury. The court has, as in every case involving the determination of questions of fact, the right to instruct the jury that there is no evidence to justify them in allowing exemplary damages, and it is error to submit the question of exemplary damages to the jury if there is no such evidence; <sup>24</sup> and the court has the power in this, as in any other case, of setting aside the verdict as exces-

<sup>19</sup> *Iaeger v. Metcalf*, 11 Ariz. 283, 94 Pac. 1094.

<sup>20</sup> *Langdon v. Bullock*, 8 Ind. 341.

<sup>21</sup> *Donnell v. Sandford*, 11 La. Ann. 645.

<sup>22</sup> *United States: Bonaparte v. Camden & A. R. R.*, 1 Bald. 205.

*New York: Beekman v. Saratoga & S. R. R.*, 3 Pai. 45.

See *McDuffee v. Fellows*, 157 Mich. 664, 122 N. W. 276.

<sup>23</sup> §§ 387, 388.

<sup>24</sup> *Lexington Ry. v. Fain*, 80 S. W. 463, 25 Ky. L. Rep. 2243.

sive.<sup>25</sup> But if there is any evidence which would justify the jury in allowing exemplary damages, the question whether such damages shall be allowed, and if so, what the amount of them shall be, is entirely for the jury, and a direction that they shall give exemplary damages is erroneous.<sup>26</sup>

Upon the same principle the amount of weight to be allowed evidence in mitigation or aggravation is entirely for the jury; and it would seem that the question whether certain evidence tends to mitigate or aggravate damages is one of fact for the jury.<sup>27</sup> It has, however, been said in Missouri<sup>28</sup> that "what circumstances will mitigate or aggravate a wrong done, is a question of law, and if any such circumstances exist, they should be pointed out by the court.

### § 1318a. Double and treble damages.

Where a plaintiff is entitled to double or treble damages it is immaterial whether the jury find actual damages and they are multiplied by the court, or the jury themselves find the multiple amount.<sup>29</sup> In New York it has been held that when the plaintiff is entitled to recover treble damages unless it appears from the record that the verdict is for single damages, it will be presumed that the treble value was found.<sup>30</sup>

### § 1319. Modifications—Setting aside verdict.

\* In the first place, a verdict may be set aside because it is against the weight of testimony. This power is, however, very sparingly exercised; and on mere questions of fact the court always interferes with great hesitation and reluctance. So, a verdict will not be disturbed merely because it appears that

<sup>25</sup> § 388.

<sup>26</sup> *Neeb v. Hope*, 111 Pa. 145; see § 387.

Therefore a verdict cannot be set aside because the jury failed to include exemplary damages.

*New York*: *Rockefeller v. Lamora*, 106 App. Div. 345, 94 N. Y. Supp. 549.

*Tennessee*: *Simpson v. Markwood*, 6 Baxt. 340.

And the amount must be left entirely to the jury.

*Georgia*: *Selman v. Barnett*, 4 Ga. App. 375, 61 S. E. 501.

*North Carolina*: *Blow v. Joyner*, 72 S. E. 319.

<sup>27</sup> See § 52.

<sup>28</sup> *Rains v. St. Louis, I. M. & S. Ry.*, 71 Mo. 164, 36 Am. Rep. 459.

<sup>29</sup> *Colorado*: *Richards v. Sanderson*, 39 Colo. 270, 89 Pac. 769.

*South Dakota*: *Jensen v. South Dakota Cent. Ry.*, 25 S. D. 406, 127 N. W. 650.

*Ante*, § 930a.

<sup>30</sup> *Prignitz v. McTiernan*, 18 Misc. 651, 43 N. Y. Supp. 974.

the jury have reasoned incorrectly. In a case in the English Common Pleas, Maule, J., said: "We are not, however, to set aside a verdict because the jury, one *or all* of them, may have reasoned inconclusively. If such a doctrine were to prevail, scarcely any verdict would stand. The trial by jury is not founded upon a supposition so absurd, as that the whole twelve will reason infallibly from the premises to the conclusion."

So, again, where a judge who tries a cause in trespass recommends a verdict for nominal damages, but the jury give substantial damages (£5), such a verdict will not be set aside as perverse.<sup>31</sup> And this rule has been repeatedly affirmed in this country. So, in Mississippi, it has been decided that a verdict will always be permitted to stand, unless it is opposed by a decided preponderance of the evidence, or is based on no evidence whatever;<sup>32</sup> and, in Texas, that the verdict of a jury founded on conflicting testimony will not be set aside, unless it be very apparent that they decided wrongly.<sup>33</sup>

### § 1320.<sup>a</sup> Instructions on questions of damages.

The jury should have such guidance from the court, in the form of instructions on the law of damages applicable to the facts shown as will enable them to understand and act upon the evidence.<sup>34</sup> And the instructions should state the law in sufficient detail, and not, by too general a charge, give the jury a "roving commission" to find such damages as they please.<sup>35</sup>

<sup>a</sup> For § 1320 of the eighth edition see § 1325.

<sup>31</sup> *Chilvers v. Greaves*, 5 Man. & Gr. 578.

<sup>32</sup> *Cicely v. State of Mississippi*, 13 Sm. & M. 202.

<sup>33</sup> *Perry v. Robinson*, 2 Tex. 400.

<sup>34</sup> *Missouri*: *Howes v. Kansas City S. Y. Co.*, 103 Mo. 60, 15 S. W. 751.

*Nebraska*: *Hoover v. Haynes*, 65 Neb. 557, 93 N. W. 732.

*Pennsylvania*: *Pauza v. Lehigh V. C. Co.*, 231 Pa. 577, 80 Atl. 1126.

*Texas*: *Lyon v. Bedgood* (Tex. Civ. App.), 117 S. W. 897.

<sup>35</sup> *Alabama*: *Southern Ry. v. Cochran*, 149 Ala. 673, 42 So. 100.

*Illinois*: *Haisler v. Hayden*, 124 Ill. App. 264.

*Indiana*: *Monongahela R. C. C. & C. Co. v. Hardsaw*, 169 Ind. 147, 81 N. E. 492; *Knoefel v. Atkins* (Ind.), 81 N. E. 601; *Chicago & E. R. R. v. Fretz*, 173 Ind. 519, 90 N. E. 76.

*Kentucky*: *Lexington Ry. v. Herring*, 97 S. W. 1127, 30 Ky. L. Rep. 269; *Louisville & N. R. R. v. Farris*, 100 S. W. 870, 30 Ky. Law Rep. 1193.

*Mississippi*: *Carbolineum W. P. & M. Co. v. Meyer*, 76 Miss. 586, 25 So. 297.

*Missouri*: *Camp v. Wabash R. R.*, 94 Mo. App. 272, 68 S. W. 96.

*New York*: *Rhodes v. Union Ry.*, 52 Misc. 501, 102 N. Y. Supp. 510.

If no assistance is given to the jury by the court, the verdict cannot be upheld;<sup>36</sup> though in a few cases it is said that if the losing party takes no exception to the lack of a definite charge he cannot complain of it after the verdict.<sup>37</sup> Where a correct charge has been given, it is not error to refuse additional instructions.<sup>38</sup>

A charge which is not based on evidence is misleading and erroneous;<sup>39</sup> so is a charge which properly and fairly understood, permits the jury to give double damages.<sup>40</sup>

### § 1321.<sup>a</sup> Effect of erroneous instructions.

An erroneous instruction cannot be alleged as ground for a new trial by a party who asked for it,<sup>41</sup> or where it was erroneous because based on facts erroneously accepted as true,

*Wisconsin:* Guinard v. Knapp, Stout & Co., 95 Wis. 482, 70 N. W. 671.

In Pittsburgh, C., C. & St. L. Ry. v. Collins (Ind.), 80 N. E. 415, the instructions were held sufficiently precise.

<sup>a</sup> For § 1321 of the eighth edition see § 1326.

<sup>36</sup> *New York:* Barr v. Schefer, 118 App. Div. 834, 103 N. Y. Supp. 733.

*Tennessee:* Citizens' St. R. R. v. Burke, 98 Tenn. 650, 40 S. W. 1085.

<sup>37</sup> *United States:* United States Smelting Co. v. Parry, 166 Fed. 407, 92 C. C. A. 159.

*Missouri:* Wheeler v. Bowles, 163 Mo. 398, 63 S. W. 675.

*Texas:* Galveston H. & S. A. Ry. v. Parish, 45 Tex. Civ. App. 493, 100 S. W. 1175.

<sup>38</sup> *Colorado:* Denver C. T. Co. v. Hills, 50 Colo. 328, 116 Pac. 125.

*Kentucky:* Exchange Bank v. Gaitskill, 37 S. W. 160, 18 Ky. L. Rep. 532.

*Texas:* Lyon v. Bedgood (Tex. Civ. App.), 117 S. W. 897.

<sup>39</sup> *Iowa:* O'Connor v. Chicago, R. I. & P. Ry., 144 Ia. 289, 122 N. W. 947.

*New York:* Clarke v. Westcott, 37 N. Y. Supp. 1111; Gilbertson v. Fortyssecond St. M. & S. N. A. Ry., 43 N. Y. Supp. 782, 14 App. Div. 294; Cam-

paretti v. Union Ry., 95 App. Div. 66, 88 N. Y. Supp. 425.

<sup>40</sup> *Georgia:* Southern Ry. v. Jordan, 129 Ga. 665, 59 S. E. 802.

*Kentucky:* Doerhoefer v. Shewmaker, 123 Ky. 646, 97 S. W. 7.

*Missouri:* Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114 (semble).

*Texas:* Texas Cent. Ry. v. Brock, 88 Tex. 310, 31 S. W. 500.

*Washington:* Simons v. Cissna, 52 Wash. 115, 100 Pac. 200.

The courts in *Texas* are marvellously acute in finding that the charge permitted the allowance of double damages. *Ft. Worth & R. G. Ry. v. Morris*, 45 Tex. Civ. App. 596, 101 S. W. 1038; *Beaumont Traction Co. v. Edge*, 46 Tex. Civ. App. 448, 102 S. W. 746; *Missouri, K. & T. Ry. v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228; *St. Louis & S. F. R. R. v. Lane*, 49 Tex. Civ. App. 541, 110 S. W. 530; *El Paso & S. W. R. R. v. O'Keefe*, 50 Tex. Civ. App. 579, 110 S. W. 1002; *Texas Midland R. R. v. Geraldson*, 54 Tex. Civ. 71, 117 S. W. 1004; *International & G. N. R. R. v. Hood*, 55 Tex. Civ. App. 334, 118 S. W. 1119.

<sup>41</sup> *Andrews v. Chicago, M. & S. P. Ry.*, 86 Ia. 677, 53 N. W. 399.

during the trial, by both parties;<sup>42</sup> nor will a verdict be set aside for an erroneous instruction which cannot have prejudiced the petitioner,<sup>43</sup> or when the error related to a separable item of damage which can be deducted from the judgment.<sup>44</sup> But in general a verdict based on an erroneous charge will be set aside, no matter how reasonable in itself, or how correct other portions of the charge may have been.<sup>45</sup> By the better view, if the error affects the amount of damages only a new trial should be confined to the question of damages.<sup>46</sup>

### § 1322.<sup>a</sup> Power of jury to act without evidence of damages.

Even in assessing non-pecuniary damages, such as compensation for pain and suffering, the jury must be guided by the evidence, and cannot go counter to it in finding their verdict.<sup>47</sup>

But in such cases the evidence cannot definitely fix the damages, and wherever the evidence leaves the amount of damages indefinite, because of the nature of the case, it is the duty of the jury to find the amount by the use of their judgment and general knowledge.<sup>48</sup>

<sup>a</sup> For § 1322 of the eighth edition, see §§ 1329, 1330.

<sup>42</sup> *Colorado*: Mountz v. Apt, 119 Pac. 150.

*Missouri*: Taylor v. Scherpe & K. A. I. Co., 133 Mo. 349, 34 S. W. 581.

<sup>43</sup> *Michigan*: Durfee v. Newkirk, 83 Mich. 522, 47 N. W. 351.

*Nebraska*: Chicago, R. I. & P. R. R. v. Archer, 46 Neb. 907, 65 N. W. 1043.

*New York*: Powell v. Fletcher, 18 N. Y. Supp. 451.

<sup>44</sup> *Kansas*: Kansas City, M. & O. Ry. v. Turley, 71 Kan. 256, 80 Pac. 605.

*Pennsylvania*: Graham v. Keys, 29 Pa. 189.

*South Dakota*: Kime v. Bank of Edgemont, 22 S. D. 630, 119 N. W. 1003.

<sup>45</sup> *Missouri*: Morris v. Grand Ave. Ry., 144 Mo. 500, 46 S. W. 170.

*Texas*: Gulf, C. & S. F. Ry. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. 777; *International & G. N. R. R. v. Cook* (Tex. Civ. App.), 33 S. W. 888.

<sup>46</sup> *Broughel v. Southern N. E. T.*

*Co.*, 72 Conn. 617, 45 Atl. 435, 49 L. R. A. 404.

<sup>47</sup> *Alabama*: Seaboard Mfg. Co. v. Woodson, 94 Ala. 143, 11 So. 733.

*Arkansas*: St. Louis, I. M. & S. Ry. v. Dallas, 93 Ark. 209, 124 S. W. 247.

*North Carolina*: Shepard v. Western U. T. Co., 143 N. C. 244, 55 S. E. 704.

<sup>48</sup> *Colorado*: Denver C. T. Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476 (companionship of wife).

*Connecticut*: Harris v. Ansonia, 73 Conn. 359, 47 Atl. 672 (shade tree).

*Illinois*: Chicago, B. & Q. R. R. v. Warner, 108 Ill. 538 (pain).

*Iowa*: Scurlock v. Boone, 142 Ia. 684, 121 N. W. 369.

*Kansas*: Chicago, K. & W. R. R. v. Willits, 45 Kan. 110, 25 Pac. 576 (injury to land).

*Nebraska*: Ellison v. Brown, 43 Neb. 68, 61 N. W. 97 (feelings); *Flinn v. Frederickson*, 131 N. W. 934 (pain).

*New York*: Countryman v. Fonda, J. & G. R. R., 166 N. Y. 201, 59 N. E. 822

### § 1323. Wrong measure of damages adopted by jury.

Where the verdict is evidently based upon an erroneous measure of damages, the court will not hesitate to set it aside.<sup>49</sup> And so where interest was not recoverable, the court directed it to be remitted.<sup>50</sup> And where a valid counter-claim was overlooked in estimating damages for the plaintiff, the verdict was not allowed to stand.<sup>51</sup> Where no damages are proved, and the case does not admit of exemplary damages, a verdict for anything more than a nominal sum will not be sustained.<sup>52</sup> And where exemplary damages have been improperly allowed by the jury, and the verdict exceeds the amount of actual damages, the court will interfere.<sup>53</sup>

Where the loss was entirely pecuniary, and the damages are much greater or less than the amount proved to be the plaintiff's loss, the verdict will be set aside.<sup>54</sup> Where the jury is known to have included in the verdict an improper item of damage, the verdict will not be set aside if it can be cured by the plaintiff remitting the excess.<sup>55</sup> But if it is impossible

(death); *Fernstein v. Jacobs*, 15 Misc. 474, 37 N. Y. Supp. 345 (loss of support); *Horowitz v. Hamburg A. P. Co.*, 41 N. Y. Supp. 54, 18 Misc. 24 (whether injury permanent).

See *ante*, § 170a.

<sup>49</sup> *United States: Palmer v. Fiske*, 2 Curt. C. C. 14.

*Kentucky: Ray v. Jeffries*, 86 Ky. 367; *Bannon v. Rohmeiser*, 34 S. W. 1084, 35 S. W. 280, 17 Ky. L. Rep. 1378.

*New Jersey: Ellsworth v. Central R. R.*, 34 N. J. L. 93.

*England: Creed v. Fisher*, 9 Ex. 472.

<sup>50</sup> *Connelly v. McNeil*, 2 Jones L. 51.

<sup>51</sup> *Havana, R. & E. R. R. v. Walsh*, 85 Ill. 58.

<sup>52</sup> *Arkansas: Smith v. Houston*, 25 Ark. 183.

*California: De Briar v. Minturn*, 1 Cal. 450.

*Georgia: Oakley Mills Manf. Co. v. Neese*, 54 Ga. 459.

*Illinois: Cochran v. Tuttle*, 75 Ill.

361; *Pittsburgh, C. & St. L. R. R. v. Dewin*, 86 Ill. 296.

<sup>53</sup> *Arkansas: St. Louis, I. M. & S. Ry. v. Hall*, 53 Ark. 7, 13 S. W. 138.

*Illinois: Toledo, P. & W. R. R. v. Patterson*, 63 Ill. 304; *Farwell v. Warren*, 70 Ill. 28; *Becker v. Dupree*, 75 Ill. 167; *Hayes v. Parmalee*, 79 Ill. 563; *Kolb v. O'Brien*, 86 Ill. 210.

*New Hampshire: Cram v. Hadley*, 48 N. H. 191.

<sup>54</sup> *Florida: Jacksonville T. & K. W. Ry., v. Roberts*, 22 Fla. 324.

*Illinois: Cassell v. Hays*, 51 Ill. 261.

*Indiana: Nutter v. Junction R. R.*, 13 Ind. 479.

*Kentucky: Ray v. Jeffries*, 86 Ky. 367.

<sup>55</sup> *United States: Bank of Kentucky v. Ashley*, 2 Pet. 327, 7 L. ed. 440.

*Illinois: Toledo, W. & W. Ry. v. Beals*, 50 Ill. 150.

*Maine: Cyr v. Dufour*, 62 Me. 20.

*Massachusetts: Lambert v. Craig*, 12 Pick. 199.

*Minnesota: Stickney v. Bronson*, 5 Minn. 215.

to determine how the jury made up their verdict, so as to correct the error, the verdict must be set aside.<sup>56</sup> In Georgia the court will, it is said, set aside a verdict if, in its opinion, there is not evidence from which the jury can ascertain the amount of damage.<sup>57</sup>

**§ 1324.<sup>a</sup> Modes of computing damages allowed the jury.**

A question has presented itself as to the mode in which the jury may arrive at the quantum of damages in cases where they are greatly divided on the question of amount. The jury cannot abdicate its functions and decide the amount by chance. So, in the old case of *Mellish v. Arnold*<sup>58</sup> a new trial was granted, "because the jury threw up cross or pile, whether they should give the plaintiff three hundred pounds or five hundred pounds damages, and the chance of five hundred pounds came up."

\* It has been decided that if they *agree beforehand*, that each juror shall mark the sum to which he conceives the plaintiff entitled, and that the total of these amounts divided in twelve (the number of jurors) shall be the verdict, the whole proceedings will be void, and a new trial will be ordered, for the reason that the whole thing is a mere matter of chance.<sup>59</sup> So, in New York, it has been decided that the jury will not be allowed to arrive at a verdict by each of the jurors marking down a particular sum, and then dividing the whole amount by the number of jurors; and on assignment of error in fact, the judgment for this cause will be reversed.<sup>60</sup> So, in England,

*New Hampshire*: *Sanborn v. Emerson*, 12 N. H. 57; *Pierce v. Wood*, 23 N. H. 519; *Willard v. Stevens*, 24 N. H. 271; *Odlin v. Gove*, 41 N. H. 465, 77 Am. Dec. 773; *Cross v. Wilkins*, 43 N. H. 332.

*New Jersey*: *Hatfield v. Central R. R.*, 33 N. J. L. 251.

*Rhode Island*: *Forbes v. Howard*, 4 R. I. 364.

*Wisconsin*: *Kavanaugh v. Janesville*, 24 Wis. 618; *Strong v. Hooe*, 41 Wis. 659.

<sup>a</sup> For § 1324 of the eighth edition, see § 1327.

<sup>56</sup> *Smith v. Dukes*, 5 Minn. 373.

<sup>57</sup> *Oakley Mills Mfg. Co. v. Neese*, 54 Ga. 459.

<sup>58</sup> *Bunb.* 51.

<sup>59</sup> *Illinois*: *Illinois Cent. R. R. v. Able*, 59 Ill. 131.

*Iowa*: *Manix v. Malony*, 7 Ia. 81.

*Mississippi*: *Parham v. Harney*, 6 Sm. & M. 55.

*Tennessee*: *Elledge v. Todd*, 1 Humph. 43, 34 Am. Dec. 616.

<sup>60</sup> *Harvey v. Rickett*, 15 Johns. 87; *Roberts v. Failis*, 1 Cowen, 238.

the court will not permit the jury to arrive at a verdict by splitting a difference.<sup>61</sup> But if the same course be taken in order to ascertain with more accuracy how the jury stands, the rule is different; and it has been held not improper for them to arrive at their verdict by each marking a sum and dividing it by twelve, provided they do not previously bind themselves to adhere to the result of the arithmetical computation.<sup>62</sup> \*\* It is, of course, error to charge the jury that this course may be pursued.<sup>63</sup> In *Boynton v. Trumbull*<sup>64</sup> the jury agreed among themselves to give a verdict for half the aggregate of the lowest and highest sums allowed by them individually, and the verdict was consequently set aside. It seems to be improper, if witnesses differ as to value, to charge the jury that an average of the estimates may be taken.<sup>65</sup> The evidence of a member of the jury will not be received to impeach the verdict.<sup>66</sup>

<sup>61</sup> *Hall v. Poyser*, 13 M. & W. 600.

<sup>62</sup> *California*: *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78; *Turner v. Tuolumne County Water Co.*, 25 Cal. 397; *Boyce v. California Stage Co.*, 25 Cal. 460.

*Illinois*: *Pekin v. Winkel*, 77 Ill. 56.

*Indiana*: *Guard v. Risk*, 11 Ind. 156.

*Iowa*: *Barton v. Holmes*, 16 Ia. 252.

*Massachusetts*: *Dorr v. Fenno*, 12 Pick. 521.

*Minnesota*: *St. Martin v. Desnoyer*, 1 Minn. 156, 61 Am. Dec. 494.

*New York*: *Dana v. Tucker*, 4 Johns. 487.

*Pennsylvania*: *Kreider's Estate*, 18 Pa. 374.

*Rhode Island*: *Forbes v. Howard*, 4 R. I. 364; *Luft v. Linganie*, 17 R. I. 420, 22 Atl. 942.

*Tennessee*: *Tinkle v. Dunivant*, 16 Lea, 503.

*Wisconsin*: *Fowler v. Colton*, Burn. 175.

<sup>63</sup> *Allard v. Smith*, 2 Met. (Ky.) 297.

<sup>64</sup> 45 N. H. 408.

<sup>65</sup> *Thomas v. Dickinson*, 12 N. Y. 364, per Johnson, J.

<sup>66</sup> *Maine*: *Hovey v. Luce*, 31 Me. 346.

*Michigan*: *Wixom v. Bixby*, 127 Mich. 479, 86 N. W. 1001.



## CHAPTER LVIII

### EXCESSIVE OR INADEQUATE DAMAGES

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| <p>§ 1325. Power of court to set aside verdicts.</p> <p>1326. What damages are excessive.</p> <p>1327. Successive verdicts.</p> <p>1328. Cases in which the court will act.</p> <p>1329. Practice.</p> <p>1330. Remission of the excess.</p> <p>1331. When a remittitur will be entered.</p> <p>1332. Action of appellate courts on excessive damages.</p> <p>1333. What amount is excessive.</p> <p>1334. Pecuniary loss.</p> <p>1335. Defamation.</p> <p>1336. False imprisonment.</p> <p>1337. Malicious prosecution.</p> <p>1338. Alienation of affections.</p> <p>1339. Breach of promise of marriage.</p> <p>1340. Seduction.</p> <p>1341. Telegraph companies.</p> <p>1342. Carriers.</p> <p>1343. Other malicious torts, or wrongs causing mental suffering.</p> <p>1344. Exemplary damages.</p> <p>1345. Assault and battery.</p> <p>1346. Physical injury; doubtful physical consequences.</p> <p>1347. Slight or temporary injury.</p> <p>1348. Broken bones: bones of leg and hip.</p> | <p>§ 1349. Bones of arm or shoulder.</p> <p>1350. Bones of the trunk.</p> <p>1351. Bones of the head.</p> <p>1352. Surgical operation.</p> <p>1353. Pain and suffering.</p> <p>1354. Permanent injuries: disability to labor.</p> <p>1355. Permanent crippling.</p> <p>1356. Loss of a member: leg or foot.</p> <p>1357. Loss of a member: arm, hand, or finger.</p> <p>1358. Disfigurement.</p> <p>1359. Impairment of sight or hearing.</p> <p>1360. Nervous disorders.</p> <p>1361. Insanity and loss of mental power.</p> <p>1362. Shortening of life.</p> <p>1363. Other permanent injuries.</p> <p>1364. Doubt as to permanence of injury.</p> <p>1365. Loss of service.</p> <p>1366. Civil damage act.</p> <p>1367. Damages for death.</p> <p>1368. Inadequate damages.</p> <p>1369. Failure to allow damages where compensation should be given.</p> <p>1370. What damages are inadequate: torts in general.</p> <p>1371. Personal injuries.</p> <p>1372. Death.</p> |
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#### § 1325.<sup>a</sup> Power of court to set aside verdicts.

The court holds itself at liberty to set aside verdicts and grant new trials even in that class of cases where there is no fixed legal rule of compensation, whenever the damages are so

<sup>a</sup> For § 1325 of the eighth edition see § 1328.

excessive as to create the belief that the jury have been misled either by passion, prejudice, or ignorance. But this power is never used except in a clear case. So, in an action for malicious indictment of the plaintiff for perjury, where a verdict of £400 was obtained, on a rule for new trial it was insisted that the verdict was excessive. But it was refused, and Lord Mansfield said: "New trials are not to be granted in this class of cases without very strong grounds indeed, and such as carry internal evidence of intemperance in the minds of the jury."<sup>1</sup>

The doctrine has been repeatedly affirmed in early cases in this country. So Mr. Justice Story decided that in cases of *tort* the verdict will not be disturbed unless it is so excessive and outrageous with reference to all the circumstances of the case, as to demonstrate that the jury have acted against the rules of law, or have suffered their passions, their prejudices, or their perverse disregard of justice to mislead them.<sup>2</sup> So, again, the same sagacious judge said: "A court of law will not set aside a verdict upon the ground of excessive damages, unless in a clear case where the jury have acted upon a gross mistake of facts, or have been governed by some improper influence or bias, or have disregarded the law."<sup>3</sup> Again, in another case, Mr. Justice Story said:

"The damages are certainly higher than what, had I sitten on the jury, I should have been disposed to give; and I should now be better satisfied if the amount had been less.<sup>4</sup> . . . It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury, merely because it exceeds that measure. The court, in setting aside a verdict for excessive damages, should clearly see that they are excessive; that there has been a gross error; that there has been a mistake of the principles upon which the damages have been estimated; or some improper motives, or feelings, or bias, which have influenced the minds of the jury. . . . Upon a mere matter of damages, where different minds might, and probably would, arrive at

<sup>1</sup> Gilbert v. Burtenshaw, Cowper, 230.

<sup>2</sup> Whipple v. Cumberland Manuf'g Co., 2 Story, 661.

<sup>3</sup> Wiggin v. Coffin, 3 Story, 1.

<sup>4</sup> Much the same language was used by the court in Harris v. Louisville, N. O. & T. Ry., 35 Fed. 116.

different results, and nothing, inconsistent with an honest exercise of judgment, appears, I, for one, should be disposed to leave the verdict as the jury found it.”<sup>5</sup>

So, in New Jersey, too, it has been declared that the court, in actions of trespass for personal torts, where damages can be gauged by no fixed standard, but necessarily rest in the sound discretion of the jury, interferes with a verdict on the mere ground of excessive damages with reluctance, and never except in a clear case.<sup>6</sup> And it has been said that although it is conceded that the courts have the power of granting a new trial in cases of *crim. con.*, still it seems that the power has never been exercised.<sup>7</sup> Even in cases where rules of law have been disregarded, or where for any reason the verdict cannot be supported, the power of the court to set aside the decision of the jury will not be exercised without regard to the justice of the case. So, where a verdict was obtained for principal and interest, as to which latter the defendant was clearly liable, but there being no count adapted to it, the verdict was not strictly regular, the court nevertheless refused to set it aside, saying: “In motions for new trial, the court may fairly endeavor to do that which advances the justice of the cause, and by refusing this rule we only save the defendant from paying with the tremendous interest of accumulated costs, what he is in justice bound to pay at once.”<sup>8</sup> A case in the English Court of Exchequer illustrates the jury’s command of the damages, where no rule of law is violated. The plaintiff, who claimed special damage from a carrier for non-delivery of goods, had sold them for as much as he could have obtained if there had been no delay, and the defendant paid into court £10, which the court considered ample to cover the expense of a journey he had taken to look after the goods, and all his actual damages. The jury having found a verdict for £5 more than had been paid in, a motion was made to set it aside as perverse. (The damages being under £20, the motion could not, under the English practice, be entertained on the ground that they were excessive.) The court, although considering the amount decreed clearly

<sup>5</sup> *Thurston v. Martin*, 5 Mason, 497, 499.

<sup>6</sup> *Berry v. Vreeland*, 21 N. J. L. 183.

<sup>7</sup> *Duberley v. Gunning*, 4 T. R. 651; *Smith v. Masten*, 15 Wend. 270.

<sup>8</sup> *Harrison v. Allen*, 2 Bing. 4.

too large, reluctantly refused to disturb the verdict, as the question whether the amount paid into court was a sufficient compensation for the plaintiff's pecuniary loss had been properly left to the jury, and the verdict was not contrary to any direction of the judge at *Nisi Prius*.<sup>9</sup> "I doubt much," says Mr. Justice Jackson, in delivering an opinion in the Court of the Irish Exchequer Chamber, "whether in any case sounding in damages, for an acknowledged breach of covenant, the judge ought to take it upon himself to *direct* a verdict for nominal damages." <sup>10</sup>

The same ground was taken in *City of Ottawa v. Sweely*,<sup>11</sup> another action for personal injuries, and the court said: "It must not be supposed, however, that verdicts in cases of torts are beyond control; but they should stand, unless they are grossly erroneous, or there is a palpable misconception of the testimony, or they are the result plainly of passion or prejudice." In cases where exemplary damages are allowable, verdicts are rarely set aside. The obvious reason for this custom is that it is not easy to decide that such a verdict is so large as to be against evidence. It is only in extraordinary cases that the court will act.<sup>12</sup> And so, in *Walker v. Erie Railway*,<sup>13</sup> an action to recover damages for personal injuries, a motion to set aside a verdict for \$20,000 was denied, Daniels, J., saying: "The rule so carefully maintained and guarded in actions upon contracts, and for tortious injuries to property, is incapable of being applied where the injury is to the person; for those injuries are without precise pecuniary measure. The law has, accordingly,

<sup>9</sup> *Adams v. Midland R. R.*, 31 L. J. (N. S.) Ex. 35. See, as to the boundary between the power of the court and that of the jury on this subject, *Smith v. Symonds*, 1 L. T. R. (N. S.) 299, where the construction of a document was left to the jury. In California, it is doubtful whether the courts of first instance have power to interfere when verdicts are excessive. *Payne v. Pacific Mail Steamship Co.*, 1 Cal. 33. In New York, the Court of Appeals cannot review the question of excessive damages. *Metcalf v. Baker*, 57 N. Y. 662; *Starbird v. Barrows*, 62 N. Y. 615;

*Maher v. Central Park, N. & E. R. R.*, 67 N. Y. 52. Unless the excess arises from error in the judge's charge. *Mechanics' & T. Bk. v. Farmers' & M. Nat. Bk.*, 60 N. Y. 40; *Starbird v. Barrows*, 62 N. Y. 615.

<sup>10</sup> *Strong v. Kean*, 13 Ir. L. R. 93.

<sup>11</sup> 65 Ill. 434, 436.

<sup>12</sup> *Illinois*: *Chicago & Alton R. R. v. Wilson*, 63 Ill. 167; *Singer Manf. Co. v. Holdford*, 86 Ill. 455.

*Texas*: *Barnette v. Hicks*, 6 Tex. 352; *McGehee v. Shafer*, 9 Tex. 20.

<sup>13</sup> 63 Barb. 260, 267.

in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the court is, and necessarily must be, not to interfere with their conclusion." So where in an action against a railroad company by a farmer for the death of his wife, who had been thrown out of his market wagon and killed through collision with the defendant's train, although the wagon had descended to the point of collision down a gradual slope for more than a quarter of a mile, in plain view of the railroad, upon which the train could have been seen coming at a great distance, and the court considered that there was not a doubt that the evil happened from either the plaintiff's misfortune or fault, for neither of which was the company liable; yet as the case had been given to the jury without any error in law, they felt themselves compelled to affirm a judgment on a verdict of \$9,150 for the plaintiff.<sup>14</sup> The discretion of the court may also be governed, to a limited extent, by previous decisions in other cases.<sup>15</sup> This practice cannot, however, be considered as strict matter of law. The argument has been sometimes advanced, that when the legislature has fixed the limit to the amount of damages recoverable for causing the death of a human being, it is improper, in actions for personal injuries, to allow a greater sum to the person injured than could have been obtained by his representative, under the statute, in case of his death.<sup>16</sup> The reasoning is not viewed with favor by the courts. These statutes are enabling in their nature and not restrictive, and the intention of the legislatures was evidently to extend, not to lessen, the rights of recovery. Besides this, the damages in the statutory action go to the family of the person whose death the defendant has caused, as compensation for *their pecuniary loss through his death*; while, in the common-law action, it is

<sup>14</sup> *Pennsylvania R. R. v. Goodman*, 62 Pa. 329.

<sup>15</sup> *Kentucky: Louisville & N. R. R. v. Fox*, 11 Bush, 495.

*New York: Travis v. Barger*, 24 Barb. 614.

<sup>16</sup> *Illinois: Illinois Cent. R. R. v. Welch*, 52 Ill. 133.

*New York: Collins v. Albany & S. R. R.*, 12 Barb. 492; *Murray v. Hudson River R. R.*, 47 Barb. 196.

the person injured who recovers for the damage done to himself. The two causes of action are thus fundamentally different, and one cannot furnish a measure of damages for the other.

### § 1326. What damages are excessive.

The power of the court to set aside a verdict on account of excessive damages is closely connected with its right to interfere when the verdict is against evidence. The power to disturb the verdict, as being excessive, rests in the discretion of the court.<sup>17</sup> But this discretion does not supplant that of the jury. The court must decide whether there is enough evidence to support the verdict, and if in its opinion there is sufficient, then the discretion of the court ceases. Up to that point, the discretion of the jury is unrestrained.<sup>18</sup> Hence it follows that verdicts are often sustained, although they do not meet with the full approval of the court.<sup>19</sup> If the amount of damages given by the jury is between the highest and lowest estimate of the witnesses, the verdict will usually be permitted to stand.<sup>20</sup> The court will interpose its power only in extreme cases.<sup>21</sup> The

<sup>17</sup> *Georgia*: *Duffield v. Tobin*, 20 Ga. 428.

*New Jersey*: *Searles v. Elizabeth*, P. & C. J. Ry., 70 N. J. L. 388, 57 Atl. 134.

<sup>18</sup> *Idaho*: *Horn v. Boise C. C. Co.*, 7 Ida. 640, 65 Pac. 145.

*New York*: *Pastor v. Regan*, 9 Misc. 547, 551, 30 N. Y. Supp. 657.

<sup>19</sup> *California*: *George v. Law*, 1 Cal. 363.

*Kentucky*: *Letton v. Young*, 2 Metc. 558.

*Maine*: *Donelly v. Booth B. & H. I. G. Co.*, 90 Me. 110, 37 Atl. 874.

*Michigan*: *Retan v. Lake Shore & M. S. Ry.*, 94 Mich. 146, 53 N. W. 1094.

*New York*: *Potter v. Thompson*, 22 Barb. 87.

*South Carolina*: *Entzminger v. Seaboard A. L. Ry.*, 79 S. C. 151, 60 S. E. 441.

*England*: *Bennett v. Alcot*, 2 T. R. 166; *Saunders v. London & N. W. Ry.*, 2 L. T. R. (N. S.) 153.

*Canada*: *Ingraham v. Parks*, 19 N. B. 101.

<sup>20</sup> *United States*: *Alaska S. S. Co. v. Collins*, 127 Fed. 937, 62 C. C. A. 569.

*Alaska*: *Linge v. Alaska Treadwell Co.*, 3 Alaska, 9.

*Colorado*: *Gaynor v. Clements*, 16 Colo. 209, 26 Pac. 324.

*Florida*: *Atlantic C. L. R. R. v. Turner*, 59 Fla. 118, 52 So. 586.

*Illinois*: *Lockwood v. Onion*, 56 Ill. 506.

*Indiana*: *Sunnyside Coal & C. Co. v. Reitz*, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

*Iowa*: *Helm v. Anchor F. I. Co.*, 132 Ia. 177, 109 N. W. 605.

*Missouri*: *Reamer v. Morrison Exp. Co.*, 93 Mo. App. 501, 67 S. W. 718.

*North Carolina*: *Denby v. Hairson*, 1 Hawks, 315.

*Texas*: *Texas Cent. R. R. v. Fisher* (Tex. Civ. App.), 43 S. W. 584.

*Canada*: *Prescott v. Walton*, 2 Han. (N. B.) 230.

<sup>21</sup> *Illinois*: *Galesburg v. Higley*, 61 Ill. 287.

verdict must be clearly excessive to be set aside,<sup>22</sup> so great as to appear at first blush to be outrageous,<sup>23</sup> so as to strike every one with its enormity and injustice,<sup>24</sup> so large that no twelve men could reasonably have given it.<sup>25</sup> The commonest grounds on which a verdict is set aside as excessive are that it shows passion, prejudice, partiality, or corruption.<sup>26</sup>

*Indiana*: *Chenowith v. Hicks*, 5 Ind. 224.

*Kentucky*: *Nolan v. Standard S. M. Co.*, 111 S. W. 290, 33 Ky. L. Rep. 740.

*New York*: *Wilcox v. Green*, 23 Barb. 639; *Scherpf v. Szadeczkzy*, 4 E. D. Smith, 110.

A verdict will not be set aside because it exceeds the limit by a few dollars. *Hueni v. Freehill*, 125 Ill. App. 345.

<sup>22</sup> *United States*: *The Commerce*, 16 Wall. 33, 21 L. ed. 465.

*Arkansas*: *Pleasants v. Heard*, 15 Ark. 403.

*California*: *Weaver v. Page*, 6 Cal. 681.

*Georgia*: *Goins v. Western R. R.*, 59 Ga. 426.

*Illinois*: *Blanchard v. Morris*, 15 Ill. 35; *Butler v. Mehrling*, 15 Ill. 488; *Chicago & N. W. Ry. v. Peacock*, 48 Ill. 253; *Cleveland, C., C. & S. L. Ry. v. Fuller*, 122 Ill. App. 36.

*Indiana*: *Pittsburg, C. & St. L. R. R. v. Hennigh*, 39 Ind. 509; *Cleveland, C., C. & S. L. Ry. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 84 N. E. 13.

*Missouri*: *Barth v. Merritt*, 20 Mo. 567.

*New Jersey*: *Allen v. Craig*, 1 Green, 294.

*South Carolina*: *Marshall v. Gunter*, 6 Rich. L. 419.

*Wisconsin*: *Murray v. Buell*, 74 Wis. 14.

<sup>23</sup> *Indiana*: *Pittsburgh, C. & St. L. Ry. v. Sponier*, 85 Ind. 165; *Ohio & M. Ry. v. Judy*, 120 Ind. 397, 22 N. E. 252.

*Kentucky*: *North v. Cates*, 2 Bibb, 591.

*Missouri*: *Fallenstein v. Boothe*, 13 Mo. 427.

<sup>24</sup> *United States*: *Wunderlich v. Mayor of New York*, 33 Fed. 854.

*New York*: *Coleman v. Southwick*, 9 Johns. 45, 6 Am. Dec. 253.

<sup>25</sup> *Praed v. Graham*, 24 Q. B. Div. 53, 59 L. J. Q. B. 230, 38 W. R. 103.

<sup>26</sup> *United States*: *McGowan v. La Plata M. & S. Co.*, 3 McCr. 393; *Brown v. Evans*, 8 Sawy. 488.

*Arkansas*: *Kelly v. McDonald*, 39 Ark. 387; *Sexton v. Brock*, 15 Ark. 345.

*California*: *Stuart v. Hoffman*, 68 Cal. 381; *Shaw v. Southern Pac. R. R.*, 157 Cal. 240, 107 Pac. 108; *Kimic v. San Jose-Los Gatos I. Ry.*, 156 Cal. 273, 104 Pac. 312.

*Colorado*: *Denver & R. G. R. R. v. Scott*, 34 Colo. 99, 81 Pac. 763.

*Connecticut*: *Woodruff v. Richardson*, 20 Conn. 238; *Haight v. Hoyt*, 50 Conn. 583.

*Florida*: *McMurray v. Basnett*, 18 Fla. 609, 43 Am. Rep. 327.

*Illinois*: *Spencer v. McMasters*, 16 Ill. 405; *Walker v. Martin*, 52 Ill. 347; *Decatur v. Fisher*, 53 Ill. 407; *Croze v. Rutledge*, 81 Ill. 266; *Hennies v. Vogel*, 87 Ill. 242; *Loewenthal v. Streng*, 90 Ill. 74; *Harper v. Black Diamond Coal Co.*, 142 Ill. App. 594.

*Indiana*: *Alexander v. Thomas*, 25 Ind. 268; *Pittsburgh, C. & St. L. Ry. v. Sponier*, 85 Ind. 165; *Pittsburgh, C., C. & S. L. Ry. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033.

*Iowa*: *Berry v. Central Ry.*, 40 Ia. 564.

*Kansas*: *Union P. Ry. v. Hand*, 7 Kan. 380; *Missouri, K. & T. Ry. v. Weaver*, 16 Kan. 456; *Atchison, T. & S.*

Courts have also set aside verdicts as showing on their face undue sympathy,<sup>27</sup> intemperance,<sup>28</sup> malice,<sup>29</sup> caprice,<sup>30</sup> mistake,<sup>31</sup> malevolence,<sup>32</sup> or evident improper motive.<sup>33</sup> "In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern, unless the damages are so excessive as to warrant the

*F. R. R. v. Moore*, 31 Kan. 197, 47 Am. Rep. 497 (statutory).

*Kentucky*: *North v. Cates*, 2 Bibb, 591; *Holburn v. Neal*, 4 Dana, 121; *Riley v. Nugent*, 1 A. K. Marsh. 431; *Louisville & N. R. R. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, 12 Am. St. Rep. 488.

*Maine*: *Field v. Plaisted*, 75 Me. 476.

*Massachusetts*: *Treanor v. Donahoe*, 9 Cush. 228.

*Minnesota*: *Beaulieu v. Parsons*, 2 Minn. 37; *Shartle v. Minneapolis*, 17 Minn. 308; *Blume v. Scheer*, 83 Minn. 409, 86 N. W. 446; *Frigstad v. Great Northern Ry.*, 101 Minn. 40, 111 N. W. 838.

*Missouri*: *Wells v. Sawyer*, 21 Mo. 354; *Goetz v. Ambs*, 27 Mo. 28; *Graham v. Pacific R. R.*, 66 Mo. 536.

*Nevada*: *Quigley v. Central P. R. R.*, 11 Nev. 350, 21 Am. Rep. 757; *Solen v. Virginia & T. R. R.*, 13 Nev. 106 (statutory).

*New Hampshire*: *Hovey v. Brown*, 59 N. H. 114.

*New Jersey*: *Ogden v. Gibbons*, 5 N. J. L. 518; *Merritt v. Harper*, 44 N. J. L. 73.

*New York*: *M'Connell v. Hampton*, 12 Johns. 236; *Tinney v. New Jersey S. B. Co.*, 5 Lans. 507; *Bierbauer v. New York C. & H. R. R. R.*, 15 Hun, 559; *Oldfield v. New York & H. R. R.*, 3 E. D. Smith, 103; *Jennings v. Van Schaick*, 13 Daly, 7.

*Ohio*: *Simpson v. Pitman*, 13 Oh. 365.

*Oklahoma*: *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107, 89 Pac. 212.

*Rhode Island*: *Concannon v. Tyler*, (R. I.), 67 Atl. 430.

*South Carolina*: *Davis v. Davis*, 2 N. & McC. 81; *Wolff v. Cohen*, 8 Rich. L. 144.

*Tennessee*: *Boyers v. Pratt*, 1 Humph. 90; *Moore v. Burchfield*, 1 Heisk. 203; *Nashville & C. R. R. v. Smith*, 6 Heisk. 174; *Tinkle v. Dunivant*, 16 Lea, 503; *Tennessee Coal & R. R. v. Roddy*, 85 Tenn. 400.

*Texas*: *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517; *Willis v. McNeill*, 57 Tex. 465; *Coffin v. Varila* (Tex. Civ. App.), 27 S. W. 956.

*Virginia*: *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666.

*Wisconsin*: *Goodno v. Oshkosh*, 28 Wis. 300.

<sup>27</sup> *Waters v. Bristol*, 26 Conn. 398.

<sup>28</sup> *New York*: *M'Connell v. Hampton*, 12 Johns. 236; *Travis v. Barger*, 24 Barb. 614.

*Tennessee*: *Boyers v. Pratt*, 1 Humph. 90; *Moore v. Burchfield*, 1 Heisk. 203.

<sup>29</sup> *Wells v. Sanger*, 21 Mo. 354.

<sup>30</sup> *Illinois*: *Jacksonville v. Lambert*, 62 Ill. 519.

*Tennessee*: *Tennessee Coal & R. R. v. Roddy*, 85 Tenn. 400.

<sup>31</sup> *Maine*: *Cyr v. Dufour*, 62 Me. 20.

*Minnesota*: *St. Paul v. Kuby*, 8 Minn. 154.

*New York*: *Blum v. Higgins*, 3 Abb. Pr. 104; *Feldman v. Levy*, 56 Misc. 563, 106 N. Y. Supp. 1092.

<sup>32</sup> *Union P. R. R. v. Hause*, 1 Wyo. 27.

<sup>33</sup> *Minnesota*: *St. Martin v. Desnoyer*, 1 Minn. 156, 61 Am. Dec. 494; *Chapman v. Dodd*, 10 Minn. 350; *Shartle v. Minneapolis*, 17 Minn. 308.



belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.”<sup>34</sup> In *Louisville & Nashville Railroad v. Fox*<sup>35</sup> counsel contended that a court cannot pronounce a verdict excessive, unless it be so great as to appear “at the first blush” to be outrageous. The court says: “There is a large number of cases in which the language quoted, or language similar in import, has been used by this court; but in nearly if not all of the cases in which such language has been used, the plaintiff was not only entitled to recover compensation, but was likewise entitled to such additional sum, by way of punishing the defendant, as the jury might deem right.” In whatever form the rule is stated, it always involves a reasonable discretionary power in the court to set aside a verdict when its amount, in view of all the circumstances, is so great as to show that the jury, in arriving at it, must have been influenced by some improper motive.

A verdict will not be set aside as excessive merely because the amount “cannot be demonstrated to be mathematically correct”;<sup>36</sup> but on the other hand if it is clearly the result of a mathematical error, as by failing to subtract an item, it will be corrected.<sup>37</sup> If the amount found exceeds the estimate of any witness, including the plaintiff, it will be set aside as excessive,<sup>38</sup> but if there is evidence to support it, a verdict will not be set aside merely because its amount exceeds the estimate of the plaintiff himself;<sup>39</sup> and an offer by the plaintiff to remit a portion of the judgment does not prove it to be excessive.<sup>40</sup> A judgment will not be reversed for a very small excess; *de minimis non curat lex*.<sup>41</sup>

<sup>34</sup> *Wilde, J., in Worster v. Canal Bridge Co.*, 16 Pick. 547.

<sup>35</sup> 11 Bush, 495, 514.

<sup>36</sup> *Warder B. & G. Co. v. Cuthbert*, 99 Ia. 681, 68 N. W. 917.

<sup>37</sup> *Gilmore v. Taylor* (Ga. App.), 59 S. E. 325.

<sup>38</sup> *Jacksonville, T. & K. W. Ry. v. Garrison*, 30 Fla. 431, 11 So. 932.

<sup>39</sup> *Minnesota: Einolf v. Thomson*, 95 Minn. 230, 103 N. W. 1026, 104 N. W. 547.

*South Dakota: Borneman v. Chicago, S. P., M. & O. Ry.*, 19 S. D. 459, 104 N. W. 208.

*Tennessee: Illinois Cent. R. R. v. Abernathy*, 106 Tenn. 722, 64 S. W. 3.

<sup>40</sup> *Taggart v. Hunter*, 5 Kan. App. 7, 47 Pac. 313.

<sup>41</sup> *Illinois: Spinner v. Roney*, 122 Ill. App. 19 (excess of \$2.81).

*Kentucky: Weick v. Dougherty*, 90 S. W. 996, 28 Ky. L. Rep. 390, 3 L. R. A. (N. S.) 348.

### § 1327. Successive verdicts.

The reluctance which the court feels in asserting its power in doubtful cases is increased, when like results have been obtained by successive verdicts.<sup>42</sup> Thus, where the plaintiff had been struck by a locomotive engine and badly injured, and had obtained successive verdicts for \$15,000, \$18,000, and \$22,250, the court refused to disturb the last.<sup>43</sup> But this consideration is not controlling, and if the verdict is clearly excessive the court will exercise its power notwithstanding the number of previous verdicts;<sup>44</sup> the action of the court in cutting down a previous verdict will not control the action of the court on the present verdict.<sup>45</sup>

### § 1328. Cases in which the court will act.

The court will act more readily in the matter of setting aside verdicts in actions of contract, where the pecuniary standard is usually followed.<sup>46</sup> But the cases fully confirm the right of the court to set aside verdicts as excessive in any kind of action.<sup>47</sup> In certain cases, such as actions for seduction<sup>48</sup> or *crim. con.*, or for breach of promise of marriage,<sup>49</sup> it would require a very large verdict to authorize the court to take any action; but this is so because the evidence would usually support

<sup>42</sup> *Arkansas*: *Sexton v. Brock*, 15 Ark. 345.

*Colorado*: *Union D. & R. R. v. Smith*, 16 Colo. 361, 27 Pac. 329.

*Georgia*: *Henderson v. Fox*, 83 Ga. 233.

*Illinois*: *Chatsworth v. Rowe*, 66 Ill. App. 55; *Mills v. Larrance*, 120 Ill. App. 83.

*Kentucky*: *Ross v. Ross*, 5 B. Mon. 20.

*New York*: *Clark v. Fox*, 10 App. Div. 514, 41 N. Y. Supp. 1091.

<sup>43</sup> *Shaw v. Boston & W. R. R.*, 8 Gray, 45.

<sup>44</sup> *New Jersey*: *Consolidated Trac. Co. v. Graham*, 62 N. J. L. 90, 40 Atl. 773.

*Wisconsin*: *Bridge v. Oshkosh*, 71 Wis. 363, 37 N. W. 409.

<sup>45</sup> *Holmes v. Jones*, 69 Hun, 346, 23 N. Y. Supp. 631.

<sup>46</sup> So in actions for services rendered, verdicts may be set aside as excessive. *Lockwood v. Onion*, 56 Ill. 506; *Darling v. McDonald*, 77 Ill. 520. And this is the practice in all actions on contract.

*Arkansas*: *Wallace v. Brown*, 17 Ark. 449; *Ayliff v. Hardy*, 25 Ark. 49.

*Illinois*: *Havana, R. & E. R. R. v. Walsh*, 85 Ill. 58.

<sup>47</sup> *Boyce v. California Stage Co.*, 25 Cal. 460.

<sup>48</sup> *Morgan v. Ross*, 74 Mo. 318. Thus in *Taylor v. Shelkett*, 66 Ind. 297, 300, the court said, "a subject for moral and social reasoning, not of mathematical demonstration, is presented."

<sup>49</sup> *Illinois*: *Richmond v. Roberts*, 98 Ill. 472, 480; *Douglas v. Gausman*, 68 Ill. 170.

*Louisiana*: *Kuck v. Johnson*, 114 La. 781, 38 So. 559.

a verdict of any magnitude. The right is often exercised in actions of tort;<sup>50</sup> and the court may even set aside a verdict

<sup>50</sup> *For injuries to land:*

*Georgia:* Holland *v.* Brooks, 40 Ga. 94; Oakley Mills Mfg. Co. *v.* Neese, 54 Ga. 459.

*Illinois:* Jacksonville *v.* Lambert, 62 Ill. 519.

*Maine:* Cyr *v.* Dufour, 62 Me. 20.

*For damages to personal property:*

*Louisiana:* Haselmeyer *v.* McLellan, 24 La. Ann. 629.

*New York:* Starbird *v.* Barrows, 62 N. Y. 615.

*In trover:* Peterson *v.* Gresham, 25 Ark. 380.

*For wrongful ejection from a house:* Dearlove *v.* Herrington, 70 Ill. 251.

*For ejection from a car on a railway:*

*Illinois:* Terre Haute, Alton & St. L. R. R. *v.* Vanata, 21 Ill. 188, 74 Am. Dec. 96; Chicago City Ry. *v.* Henry, 62 Ill. 142; Ill. Cent. R. R. *v.* Johnson, 67 Ill. 312; Ill. Cent. R. R. *v.* Cunningham, 67 Ill. 316; Chicago, B. & Q. R. R. *v.* Griffin, 68 Ill. 499.

*Ohio:* Cincinnati, H. & D. R. R. *v.* Cole, 29 Oh. St. 126, 23 Am. Rep. 729.

*Wisconsin:* Bass *v.* Chicago & N. W. R. R., 39 Wis. 636.

*For personal injuries:*

*Illinois:* Chicago & R. I. R. R. *v.* McKean, 40 Ill. 218; Decatur *v.* Fisher, 53 Ill. 407; Chicago *v.* Fowler, 60 Ill. 322; Chicago *v.* Kelly, 69 Ill. 475; Northern Line Packet Co. *v.* Binninger, 70 Ill. 571; Chicago *v.* Elzeman, 71 Ill. 131; Chicago & Alton R. R. *v.* Murray, 71 Ill. 601, 22 Am. Rep. 122; Chicago *v.* Hoy, 75 Ill. 530; Chicago, R. I. & P. R. R. *v.* McKittrick, 78 Ill. 619; Chicago *v.* Brophy, 79 Ill. 277.

*Iowa:* Deppe *v.* Chicago, I. & P. R. R., 38 Iowa, 592; Belair *v.* Chicago & N. W. R. R., 43 Iowa, 662.

*Maine:* Hanson *v.* European & N. A. R. R., 62 Me. 84, 16 Am. Rep. 404.

*New York:* Clapp *v.* Hudson River

R. R., 19 Barb. 461; McMahon *v.* Walsh, 43 N. Y. Super. Ct. 36.

*For causing death:* Potter *v.* Chicago & N. W. R. R., 22 Wis. 615.

*For malicious prosecution:*

*California:* Potter *v.* Seale, 5 Cal. 410; Russell *v.* Dennison, 45 Cal. 337.

*Illinois:* Nelson *v.* Danielson, 82 Ill. 545.

*For false imprisonment:*

*Georgia:* Green *v.* Southern Express Co., 41 Ga. 515.

*Illinois:* Newton *v.* Locklin, 77 Ill. 103.

*For assault and battery:*

*Illinois:* Mitchell *v.* Robinson, 72 Ill. 382; Alcorn *v.* Mitchell, 63 Ill. 553 (an action brought against defendant for spitting in plaintiff's face, in which \$1,000 was held not excessive).

*Mississippi:* Bell *v.* Morrison, 27 Miss. 68.

*For slander:*

*Illinois:* Flagg *v.* Roberts, 67 Ill. 485; Miller *v.* Johnson, 79 Ill. 58.

*Missouri:* Woodson *v.* Scott, 20 Mo. 272.

*New York:* Potter *v.* Thompson, 22 Barb. 87.

*For libel:*

*California:* McDaniel *v.* Baca, 2 Cal. 326.

*Illinois:* Storey *v.* Wallace, 60 Ill. 51.

*New York:* Daly *v.* Byrne, 43 N. Y. Super. Ct. 261.

*For enticing plaintiff's wife away:* Scherpf *v.* Szadeczky, 1 Abb. Pr. (N. Y.) 366.

*For seduction:*

*Arkansas:* Patterson *v.* Thompson, 24 Ark. 55.

*New York:* Sargent *v.* ———, 5 Cow. 106; Travis *v.* Barger, 24 Barb. 614, and cases there cited.

*For crim. con.:* Crose *v.* Rutledge, 81 Ill. 266. (Though in such an action a

for exemplary damages on the ground that it is excessive.<sup>51</sup> Where, however, a statute makes the jury the sole judges of the amount of damages, the court cannot disturb their finding.<sup>52</sup> The court can set aside a referee's report on account of excessive damages, as well as a verdict.<sup>53</sup> And it seems that, in a proper case, the assessment of a judge may be reversed for the same reason.<sup>54</sup>

### § 1329. Practice.

The objection to a verdict that it is excessive must be made by a motion to set it aside on that ground.<sup>55</sup> It cannot be considered on a simple appeal from a judgment.<sup>56</sup> The point must be made at the trial, for otherwise the verdict will not be disturbed, even if it is probably incorrect.<sup>57</sup> The usual practice upon setting a verdict aside because it is excessive is to order a new trial; which may be upon the *quantum* of damages alone.<sup>58</sup>

### § 1330. Remission of the excess.

In some cases where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this is actions of tort as well as on contracts.<sup>59</sup>

verdict is seldom disturbed. *Harris v. Rupel*, 14 Ind. 209.)

<sup>51</sup> *Kentucky*: *Louisville & N. R. R. v. Brown*, 127 Ky. 732, 106 S. W. 795, 13 L. R. A. (N. S.) 1134.

*Mississippi*: *Alabama & V. Ry. v. Gibbs* (Miss.), 12 So. 545.

<sup>52</sup> *Lewis v. Black*, 27 Miss. 425.

<sup>53</sup> *Eastman v. Mayor of New York*, 5 Robt. 389.

<sup>54</sup> *Miles v. Barrows*, 122 Mass. 579.

<sup>55</sup> *Maine*: *Moody v. Camden*, 61 Me. 264.

*Michigan*: *Cascarella v. National Grocer Co.*, 151 Mich. 15, 114 N. W. 857.

<sup>56</sup> *Alfaro v. Davidson*, 40 N. Y. Super. Ct. 87.

<sup>57</sup> *Colorado*: *J. W. Hugus & Co. v. Hardenburg*, 19 Colo. App. 464, 76 Pac. 543.

*Pennsylvania*: *Patton v. Philadelphia*, 189 Pa. 602, 42 Atl. 296.

*England*: *Fletcher v. Tayleur*, 17 C. B. 21.

<sup>58</sup> *Boyd v. Brown*, 17 Pick. 453.

In New York the Appellate Division of the Supreme Court may further reduce a verdict already reduced by the trial judge. *Stemmerman v. Nassau El. R. R.*, 36 App. Div. 218, 56 N. Y. Supp. 730.

<sup>59</sup> *United States*: *Blunt v. Little*, 3 Mas. 102; *The Grecian Monarch*, 32 Fed. 635; *Fotheringham v. Adams Ex. Co.*, 36 Fed. 252.

In New York the Court of Appeals may grant the privilege of reducing the verdict when the excess is due to the mistake of the court.<sup>60</sup> As to whether an intermediate court can give the plaintiff the option of reducing the verdict, or of trying the case again, when the jury has erred in giving excessive damages, the decisions in that State have not been uniform. It was once held that the court *in banc* has no such power.<sup>61</sup> But the law is now settled otherwise, and in favor of this power.<sup>62</sup> Under the Louisiana Code the damages may be reduced by the court absolutely, without any choice on the part of the plaintiff.<sup>63</sup> In Georgia it is held that counsel may voluntarily remit part of a verdict, pending motion for a new trial, and if the balance is not excessive the verdict will not be set aside.<sup>64</sup>

*Arizona:* Southern Pac. Co. v. Tomlinson, 4 Ariz. 126, 33 Pac. 710.

*California:* Kinsey v. Wallace, 36 Cal. 462, 95 Am. Dec. 199.

*Illinois:* Illinois Cent. R. R. v. Ebert, 74 Ill. 399.

*Iowa:* Collins v. Council Bluffs, 35 Ia. 432; Lombard v. Chicago, R. I. & P. R. R., 47 Ia. 494.

*Kansas:* Missouri P. Ry. v. Dwyer, 36 Kan. 58; Francis v. Brock, 80 Kan. 100, 102 Pac. 472.

*Massachusetts:* Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80.

*Minnesota:* Craig v. Cook, 28 Minn. 232.

*Mississippi:* Young v. Englehard, 1 How. 19.

*Montana:* Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45.

*New Hampshire:* Belknap v. Boston & M. R. R., 49 N. H. 358.

*New Jersey:* Union v. Durkes, 38 N. J. L. 21.

*New York:* Bishop v. Autographic R. R., 19 App. Div. 268, 46 N. Y. Supp. 97; Diblin v. Murphy, 3 Sandf. 19.

*Ohio:* Pendleton St. R. R. v. Rahmann, 22 Oh. St. 446; Iron R. R. v. Mowery, 36 Oh. St. 418, 38 Am. Rep. 597.

*Pennsylvania:* Yeager v. Weaver, 64 Pa. 425, 3 Am. Rep. 601.

*Rhode Island:* Burdick v. Weeden, 9 R. I. 139.

*South Carolina:* Guerry v. Kerton, 2 Rich. L. 507.

*Wisconsin:* Murray v. Buell, 74 Wis. 14, 41 N. W. 1010.

*England:* Belt v. Lawes, 12 Q. B. D. 356; Davidson v. Molyneux, 17 L. T. R. (N. S.) 289. But the practice has been repudiated by the House of Lords: Watt v. Watt, [1905] A. C. 115.

*Canada:* Steadman v. Venning, 22 N. B. 639.

<sup>60</sup> Mechanics' & T. Bank v. Farmers' & M. Nat. Bank, 60 N. Y. 40.

<sup>61</sup> Moffet v. Sackett, 18 N. Y. 522; Cassin v. Delany, 38 N. Y. 178.

<sup>62</sup> Collins v. Albany & S. R. R., 12 Barb. 492; Clapp v. Hudson River R. R., 19 Barb. 461; Potter v. Thompson, 22 Barb. 87; Murray v. Hudson River R. R., 47 Barb. 196; Sears v. Conover, 3 Keyes, 113; Hayden v. Florence Sewing Machine Co., 54 N. Y. 221.

<sup>63</sup> Black v. Carrollton R. R., 10 La. Ann. 33, 63 Am. Dec. 586; Mortimer v. Thomas, 23 La. Ann. 165; Haselmeyer v. McLellan, 24 La. Ann. 629; Cointement v. Cropper, 41 La. Ann. 303.

<sup>64</sup> Central R. R. v. Crosby, 74 Ga. 737, 58 Am. Rep. 463.

But in Texas this power of reducing the verdict by the action of the court has been limited to those cases where the measure of damages is matter of law, upon the ground<sup>65</sup> that in other cases the court has no right to substitute its opinion for that of the jury.

In Tennessee, in the case of *Vaulx v. Herman*,<sup>66</sup> the trial court was dissatisfied with the verdict; but upon the plaintiff remitting part of it, refused to set the verdict aside. This was held upon appeal to have been error; for the trial court, if dissatisfied with the verdict, should set it aside. This would seem to deny the right of the court in that State to give the plaintiff an option between a *remittitur* and a new trial. In Wisconsin the Supreme Court, in case of an excessive verdict, grants a new trial, no right of *remittitur* being recognized in that court; but the court indicates what amount of damages would not be thought excessive.<sup>67</sup>

The form of the *remittitur* is, that the verdict will be set aside and a new trial granted unless within a time limited the plaintiff files in court his remission of all the verdict except the amount named. If the plaintiff fails to file his remission within the time named, the verdict is set aside;<sup>68</sup> while if the plaintiff does file his remission it is a voluntary act, and he cannot thereafter ask for judgment on the original verdict.<sup>69</sup>

### § 1331. When a remittitur will be entered.

While the granting of a *remittitur* lies entirely within the discretion of the court, this discretion will usually be exercised in accordance with reason and precedent; and an examination of the cases in which it has been and had not been ordered is profitable. On principle the court should in no case grant the *remittitur* as of course; for the prejudice and passion of the jury may well have entered into the finding upon other issues besides the amount of damages.<sup>70</sup> The court should be well satis-

<sup>65</sup> *Thomas v. Womack*, 13 Tex. 580.

<sup>66</sup> 8 Lea, 687.

<sup>67</sup> *Goodno v. Oshkosh*, 28 Wis. 300; *Patten v. Chicago & N. W. Ry.*, 32 Wis. 524.

<sup>68</sup> *Winningham v. Philbrick*, 56 Wash.

38, 105 Pac. 144 (no further time can be given by the Supreme Court).

<sup>69</sup> *Colorado: Colorado City v. Liafe*, 28 Colo. 468, 65 Pac. 630.

*Florida: Pensacola Gas Co. v. Pebley*, 25 Fla. 381, 5 So. 593.

<sup>70</sup> *Loewenthal v. Streng*, 90 Ill. 74.

fied with the finding of the jury upon other issues, before the verdict is allowed to stand upon a *remititur* being entered. And in Arkansas it was held that where exemplary damages are wrongly included, the court is incompetent to order a *remititur*.<sup>71</sup> In West Virginia it is said that a *remititur* will not be ordered where the court has no bases for estimating the exact amount of the damages.<sup>72</sup>

Where the damages are excessive, but the excessive portion of the verdict may easily be separated, the court will order the remission of this portion, and, upon that being done, will uphold the verdict;<sup>73</sup> as where the verdict is so much for compensatory and so much for exemplary damages, and exemplary damages are not permissible,<sup>74</sup> or the verdict is excessive only because it exceeds the amount claimed.<sup>75</sup> And where the excess is due to an error in calculation which is discoverable by the court, the error may be corrected by a *remititur*.<sup>76</sup>

On the other hand, if the verdict is excessive because of bias, passion, or prejudice, the error taints the whole verdict, and a new trial should be granted without *remititur*;<sup>77</sup> or if there is no way of estimating the excess, as where exemplary damages were wrongly included with compensatory,<sup>78</sup> or an erroneous conception of the law acted upon by the jury.<sup>79</sup> But where

<sup>71</sup> St. Louis, I. M. & S. Ry. v. Hall, 53 Ark. 7, 13 S. W. 138.

<sup>72</sup> Unfried v. Baltimore & O. R. R., 34 W. Va. 260, 12 S. E. 512.

<sup>73</sup> Georgia: City & S. Ry. v. Brauss, 70 Ga. 368.

Iowa: Callanan v. Shaw, 24 Ia. 441.

Nebraska: Brown v. Drake, 28 Neb. 695, 45 N. W. 47.

<sup>74</sup> Utah: Rugg v. Tolman, 117 Pac. 54.

Wisconsin: Stone v. Chicago, S. P. M. & O. Ry., 88 Wis. 98, 59 N. W. 457.

<sup>75</sup> Geisberg v. Mutual B. & L. Assoc. (Tex. Civ. App.), 60 S. W. 478.

<sup>76</sup> Montana: Lewis v. Northern Pac. Ry., 36 Mont. 207, 92 Pac. 469.

New York: Muller v. Barker (Misc.), 90 N. Y. Supp. 388.

Oklahoma: Chicago, R. I. & P. Ry. v. Wehrman, 25 Okla. 147, 105 Pac. 328.

Texas: Lewter v. Lindley (Tex. Civ. App.), 121 S. W. 178.

<sup>77</sup> Colorado: F. M. Davis I. W. Co. v. White, 31 Colo. 82, 71 Pac. 384.

Georgia: Savannah, F. & W. Ry. v. Harper, 70 Ga. 119.

Iowa: Welsh v. Tri-City Ry., 148 Ia. 200, 126 N. W. 1118.

Kansas: Steinbuechel v. Wright, 43 Kan. 307, 23 Pac. 560; Drumm v. Cessnun, 58 Kan. 331, 49 Pac. 78.

Minnesota: Mastellar v. Great Northern Ry., 100 Minn. 236, 110 N. W. 869.

<sup>78</sup> Illinois: Chicago U. T. Co. v. Lauth, 216 Ill. 176, 74 N. E. 738.

Mississippi: Chicago, St. L. & N. O. R. R. v. Jarrett, 59 Miss. 470.

<sup>79</sup> United States: Jayne v. Loder, 149 Fed. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984.

the error is the simple one of grossly overestimating, in the opinion of the court, the proper compensation for a loss which the jury is properly directed to estimate, it is usually held proper for the court to permit a *remittitur*, even if the injury is a non-pecuniary one.<sup>80</sup> In a few such cases, however, the court has declined to order a *remittitur*, but has set the verdict aside and ordered a new trial.<sup>81</sup>

### § 1332. Action of appellate courts on excessive damages.

It is not every court which will interfere in a case of excessive damages. In some courts which sit exclusively to decide points of law, the question of excessive damages is not considered, being left entirely to the trial court. It has been so determined in the New York Court of Appeals,<sup>82</sup> and in the Supreme Courts of Illinois,<sup>83</sup> New Hampshire,<sup>84</sup> Oregon,<sup>85</sup> South Carolina,<sup>86</sup> and in the Federal appellate courts.<sup>87</sup> In Connecticut it was said that the Supreme Court would not review a verdict unless all the evidence were before them.<sup>88</sup>

On the other hand, it sometimes happens that the trial court sets aside or cuts down the verdict of a jury, and the plaintiff thereupon takes the question to an appellate court; and that

*Illinois*: Jones & Adams Co. v. George, 227 Ill. 64, 81 N. E. 4.

<sup>80</sup> *California*: Davis v. Southern Pac. Co., 98 Cal. 13, 32 Pac. 646.

*Florida*: Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 593.

*Kansas*: Union Pac. Ry. v. Mitchell, 56 Kan. 324, 43 Pac. 244; Davis v. Atchison, T. & S. F. Ry., 81 Kan. 505, 106 Pac. 288; Rea-Patterson Mill Co. v. Myrick, 10 Kan. App. 581, 63 Pac. 462 (pecuniary damage).

*Missouri*: Osborn v. Quincy, O. & K. C. Ry. (Mo. App.), 129 S. W. 226.

*Texas*: Producers' Oil Co. v. Barnes (Tex. Civ. App.), 120 S. W. 1023.

<sup>81</sup> *Arizona*: Southern Pac. Co. v. Fitchett, 9 Ariz. 128, 80 Pac. 359.

*Indiana*: Nickey v. Zonker, 22 Ind. App. 211, 53 N. E. 478.

*Kansas*: Atchison, T. & S. F. R. R. v. Richards, 58 Kan. 344, 49 Pac. 436.

*Missouri*: Thero v. Missouri Pac. Ry., 144 Mo. App. 161, 129 S. W. 266.

<sup>82</sup> Gale v. New York C. & H. R. R. R., 76 N. Y. 594.

<sup>83</sup> McCulloch v. Illinois Steel Co., 243 Ill. 464, 90 N. E. 664.

<sup>84</sup> Merrill v. Perkins, 61 N. H. 262.

<sup>85</sup> Nelson v. Oregon Ry. & N. Co., 13 Ore. 141, 9 Pac. 321, 57 Am. Rep. 6; Lindsay v. Grande R. L. Co., 48 Ore. 430, 87 Pac. 145.

<sup>86</sup> Petrie v. Columbia & G. R. R., 29 S. C. 303.

<sup>87</sup> Illinois Cent. R. R. v. Davies, 146 Fed. 247, 76 C. C. A. 613; Mason C. & F. D. R. R. v. Boynton, 158 Fed. 599, 85 C. C. A. 421; Toledo, S. L. & W. R. R. v. Kountz, 168 Fed. 832, 94 C. C. A. 244.

<sup>88</sup> Page v. Merwin, 54 Conn. 426.



court may then reverse the action of the trial court and restore the verdict of the jury on the ground that it was not excessive.<sup>89</sup>

### § 1333. What amount is excessive.

In determining what amount is excessive the court is not only exercising its discretion, but also passing on a question of fact, raised in a particular case which cannot be like any other case subsequently presented. No decision upon what amount of damages is excessive can therefore be an authority in any other case. Yet it is sometimes most helpful to a court, in deciding the question of excessiveness, to know what has been the action of other courts in similar cases; not as establishing a controlling rule of law, but as evidence of the common judgment or opinion of courts on the subject.<sup>90</sup> A verdict largely exceeding the average amount awarded for injuries of a like nature and extent has been said to be excessive.<sup>91</sup> And in an action in Louisiana, for the death of two children, where the court was to estimate the proper compensation, finding that it had previously allowed \$6,000 for the death of one child of about the same age, it allowed \$12,000 for the death of the two children.<sup>92</sup>

For these reasons it has seemed wise to collect here a large number of cases where the courts have passed upon the excessiveness or inadequacy of verdicts. But considering that "the purchasing power of money is less than it has been in the past,"<sup>93</sup> and that any but recent cases might for that reason and other similar reasons be misleading rather than helpful, we have generally confined our citation of authorities to cases recently decided.

<sup>89</sup> *Minnesota*: *Blume v. Scheer*, 83 Minn. 409, 86 N. W. 446; *Halness v. Anderson*, 110 Minn. 204, 124 N. W. 830.

*New York*: *Scott v. Sun P. & P. Assoc.*, 74 Hun, 284, 26 N. Y. Supp. 690.

*Rhode Island*: *Smith v. Macomber*, 28 R. I. 248, 66 Atl. 570.

<sup>90</sup> *Johnson v. Long Island R. R.*, 144 N. Y. 719, 39 N. E. 857, 80 Hun, 306, 30 N. Y. Supp. 318; *Swanton v. King*,

72 App. Div. 578, 76 N. Y. Supp. 528. See *McMahon v. New Orleans R. & L. Co.*, 127 La. 544, 53 So. 857, 32 L. R. A. (N. S.) 346.

<sup>91</sup> *Lockwood v. Twenty-third St. Ry.*, 15 Daly, 374, 7 N. Y. Supp. 663.

<sup>92</sup> *Cherry v. Louisiana & A. Ry.*, 121 La. 471, 46 So. 596, 17 L. R. A. (N. S.) 505.

<sup>93</sup> *Monroe, J.*, in *Dole v. New Orleans Ry. & L. Co.*, 121 La. 945, 46 So. 929, 19 L. R. A. (N. S.) 623.

### § 1334. Pecuniary loss.

Where the loss is pecuniary, or to property, the verdict will not in general be regarded as excessive where the amount of it is no greater than is justified by some evidence in the case,<sup>94</sup> or is greater only by the amount of allowable interest.<sup>95</sup> On the other hand, if the verdict much exceeds the highest estimate of value by the witnesses, it will be set aside as excessive.<sup>96</sup>

The court has passed upon verdicts claimed to be excessive in many cases of ordinary trespass,<sup>97</sup> aggravated tres-

<sup>94</sup> *Iowa*: Ball v. Keokuk & N. W. Ry., 74 Ia. 132, 37 N. W. 110.

*Kansas*: Pate v. Fitzhugh, 46 Kan. 129, 26 Pac. 452.

*Minnesota*: Hinton v. Eastern Ry., 72 Minn. 339, 75 N. W. 373.

*Nebraska*: Buel v. Chicago, R. I. & P. Ry., 81 Neb. 430, 116 N. W. 299.

*Nevada*: Paul v. Cragnaz, 25 Nev. 293, 59 Pac. 857, 60 Pac. 983.

*New York*: McCarten v. Flagler, 69 Hun, 134, 23 N. Y. Supp. 263; Meisch v. Rochester El. Ry., 72 Hun, 604, 25 N. Y. Supp. 244; Hentz v. Mt. Vernon, 78 App. Div. 515, 79 N. Y. Supp. 774; *Reisenberg v. New York City Ry.* (Misc.), 91 N. Y. Supp. 4.

*North Dakota*: McDonnell v. Minneapolis, S. P. & S. S. M. Ry., 17 N. D. 606, 118 N. W. 819.

*Texas*: Missouri Pac. Ry. v. Peay (Tex. Civ. App.), 26 S. W. 768; *Foley v. Houston, B. & T. Ry.* (Tex. Civ. App.), 110 S. W. 96.

*Wisconsin*: Dwight Bros. Paper Co. v. Western Paper Co., 114 Wis. 414, 90 N. W. 444.

*Wyoming*: Chicago, B. & Q. R. R. v. Morris, 16 Wyo. 308, 93 Pac. 664.

Where the verdict was greatly in excess of the evidence of all unprejudiced witnesses, though no greater than the plaintiff's estimate, the court in one case set the verdict aside as not supported by the evidence. *Turner v. Hardin*, 80 Ia. 691, 45 N. W. 758.

<sup>95</sup> *Chicago, S. L. & P. R. R. v. Barnes*, 2 Ind. App. 213, 28 N. E. 328.

<sup>96</sup> *Georgia*: Postal T. C. Co. v. Peyton, 124 Ga. 746, 52 S. E. 803, 3 L. R. A. (N. S.) 333.

*Kansas*: Wichita & C. Ry. v. Gibbs, 47 Kan. 274, 27 Pac. 991; *Upcher v. Oberlender*, 50 Kan. 315, 31 Pac. 1080.

*New Jersey*: Thompson v. Morris C. & B. Co., 17 N. J. L. 480.

*Wisconsin*: Murray v. Buell, 74 Wis. 14, 41 N. W. 1010; *McNamara v. McNamara*, 108 Wis. 613, 84 N. W. 901.

But see *Rhode Island*: Shibley v. Gendron, 25 R. I. 519, 57 Atl. 304.

<sup>97</sup> The following verdicts have been held not too great:

\$40 for cutting a fish-net by one who claimed exclusive right to fish; actual damage \$2. *Rose v. Belyea*, 1 Han. (N. B.) 109.

\$50 for occupying one-twelfth of an acre of land for four years and a half, the land being worth \$50 per acre, where there were no special damages. *Henderson v. Chicago, R. I. & P. Ry.*, 83 Ia. 221, 48 N. W. 1029.

\$150 for breaking open cellar door to remove gas meter; no actual damage and no aggravation. *Reed v. New York & R. Gas Co.*, 93 App. Div. 453, 87 N. Y. Supp. 810.

\$600 for entering house, expelling wife, removing furniture, pulling down side of house, and opening cow pen. *Cook v. Garza*, 9 Tex. 358.

The following have been held excessive:

pass,<sup>98</sup> illegal seizure of property on legal process,<sup>99</sup> wrongful attachment of wires,<sup>100</sup> and other acts of trespass on, or injury to, real estate;<sup>101</sup> and the same general considera-

\$300 for entering house and removing goods worth less than \$50. *Donhard v. Shirley*, 56 S. W. 17, 21 Ky. L. Rep. 1653.

\$300 for entering land while hunting and resisting ejection. *Broughton v. Singleton*, 2 N. & McC. (S. C.) 338.

<sup>98</sup> The following verdicts for malicious trespass have been upheld:

\$250 for digging up land on Sunday in oppressive manner. *Koenigs v. Jung*, 73 Wis. 178, 40 N. W. 801.

\$325 for entering land and tearing down wall. *Zimmerman v. Bonzar* (Pa.), 16 Atl. 71.

\$500 for violent and high-handed crossing of land. *Golding v. Williams*, *Dud.* (S. C.) 92.

\$500 for maliciously pulling down house. *Chapman v. Kincaid*, 8 *Humph.* (Tenn.) 150.

£500 for boisterously sporting on land. *Merest v. Harvey*, 5 *Taunt.* 442, 1 *Marsh.* 139.

\$3,000 for violent trespass, actual damage \$20. *Johnson v. Hannahan*, 3 *Strob.* (S. C.) 425.

\$5,000 for entering and putting up insulting handbill. *Ogden v. Gibbons*, 5 *N. J. L.* 518.

<sup>99</sup> The following verdicts have been upheld:

\$21.60 actual and \$50 exemplary for taking exempt property on execution. *Stonestreet v. Crandell*, 10 *Kan. App.* 575, 62 *Pac.* 249.

\$400 besides value of property for taking exempt property. *Caldwell v. Porcher* (Tex.), 17 *S. W.* 87.

\$500 for illegal distraint for rent on Sunday. *Mayfield v. White*, 1 *Browne* (Pa.), 241.

\$500 for breaking into house while owner was ill to serve summons in civil

action. *Foley v. Martin* (Cal.), 71 *Pac.* 165.

\$1,350 including exemplary damages for killing cattle as diseased. *Pearson v. Zehr*, 138 *Ill.* 48, 29 *N. E.* 854.

The following has been set aside:

\$500 for unlawful seizure of property worth \$76. *Texas Installment Co. v. Lewis* (Tex. Civ. App.), 30 *S. W.* 486.

<sup>100</sup> The following verdicts have been upheld:

\$50 for attaching wires to chimney. *Bunke v. New York Tel. Co.*, 188 *N. Y.* 600, 81 *N. E.* 1161, affirming 110 *App. Div.* 24, 97 *N. Y. Supp.* 66.

\$280 for loss of time worth on the evidence \$240. *Friedman v. Brooklyn Heights R. R.*, 52 *Misc.* 477, 102 *N. Y. Supp.* 525.

\$333 for erecting poles on land and stringing wires. *Dobson v. Postal T. C. Co.*, 79 *S. C.* 429, 60 *S. E.* 948.

The following was set aside:

\$500 actual and exemplary for cutting eight feet from top of ornamental shade trees. *Cumberland T. & T. Co. v. Cassidy*, 78 *Miss.* 666, 29 *So.* 762.

<sup>101</sup> The following verdicts have been upheld:

\$10 for collecting surface water in front of plaintiff's premises. *Howard v. Lamoni*, 124 *Ia.* 348, 100 *N. W.* 62.

\$250 for injury lessening yearly rental \$100. *Smith v. Felt*, 50 *Barb.* (N. Y.) 612.

\$250 for obstructing highway for two hours. *Tutwiler C. C. & I. Co. v. Nail*, 141 *Ala.* 374, 37 *So.* 634.

\$300 for destroying roof, well and cistern and breaking fences, sidewalk, window glass and porches. *Sanitary Dist. of Chicago v. Kompare*, 135 *Ill. App.* 312.

tions apply to actions brought for other miscellaneous pecuniary injuries.<sup>102</sup>

### § 1335. Defamation.

The jury is always allowed a wide range in finding damages for defamation. Actual malice, long-continued defamation, and other circumstances justifying exemplary damages will support a large verdict;<sup>103</sup> and for imputations against a woman's chastity liberal verdicts have been allowed to stand.<sup>104</sup>

\$675 for nuisance by flooding with sewage, causing illness. *Houston v. Bryan*, 2 Tex. Civ. App. 553, 22 S. W. 231.

The following has been set aside:

\$400 for obstructing right of way causing slight damage. *Schaaf v. Pennsylvania R. R.*, 77 N. J. L. 115, 71 Atl. 114.

<sup>102</sup> The following verdicts have been upheld:

\$200 for failure to construct farm crossings, causing inconvenience. *Van Jellico Min. Co. v. Rollins*, 108 S. W. 235, 32 Ky. L. Rep. 1190.

\$2,500 for failure to restore a highway, necessitating use of a road 1¼ miles longer. *Post v. West Shore Ry.*, 123 N. Y. 580, 26 N. E. 7.

\$5,000 for slander of title, causing business to fall off and loss of sale of lease and goodwill for \$3,700. *Hopkins v. Downe*, 21 R. I. 20, 41 Atl. 567.

The following have been set aside:

\$127.50 for breach of contract to operate sight-seeing cars, being maximum loss if car was full each trip. *Zabinsko v. Bedford Garage*, 134 App. Div. 318, 118 N. Y. Supp. 959.

\$483.50 for keeping out of possession of household goods for a short time. *Margolith v. McDonald*, 62 S. W. 1026, 23 Ky. L. Rep. 248.

\$1,560, damage to land not taken by railway, no special damage shown. *St. Louis & I. B. Ry. v. Barnsback*, 234 Ill. 344, 84 N. E. 931.

<sup>103</sup> The following verdicts have been upheld:

\$40,000 actual and \$10,000 exemplary damages for malicious statements to customers, injuring business. *American F. L. M. Co. v. Brown*, 54 Tex. Civ. App. 448, 118 S. W. 1106.

\$45,000, where there had been long-continued persecution. *Smith v. Times Co.*, 4 Pa. Dist. Ct. 399.

\$25,000, where there was gross aggravation. *Young v. Fox*, 49 N. Y. Supp. 634.

\$5,000 for wanton publication imputing swindle in newspaper of large circulation. *Hartman v. Morning Journal Assoc.*, 19 N. Y. Supp. 398.

\$3,000 for malicious publication imputing adultery. *Grace v. McArthur*, 76 Wis. 641, 45 N. W. 518.

\$2,000 for malicious blacklisting. *Missouri Pac. Ry. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384.

The following verdicts have been reduced or set aside:

\$2,000 for wanton transmission of libellous and insulting message reduced to \$1,000. *Peterson v. Western U. T. Co.*, 75 Minn. 368, 77 N. W. 985.

\$5,200 for same libel set aside. *Peterson v. Western U. T. Co.*, 65 Minn. 18, 67 N. W. 646.

\$40,000 for malicious charges against magistrate reduced to \$25,000. *Crane v. Bennett*, 77 App. Div. 102, 79 N. Y. Supp. 66.

<sup>104</sup> The following verdicts have been upheld:

A charge of crime, especially if followed by actual prosecution as a consequence, will support a finding of heavy damages.<sup>105</sup> And defamation affecting business or otherwise injuring the plaintiff is liberally compensated.<sup>106</sup>

\$500 for imputing unchastity. *Flannigan v. Stauss*, 131 Wis. 94, 111 N. W. 216.

\$800 for slander by wealthy man. *Fuller v. Fenner*, 16 Barb. 333.

\$800 for slander against married woman. *Emerson v. Miller*, 115 Ia. 315, 88 N. W. 803.

\$887.66 for malicious slander against recently married woman of 16. *Raynolds v. Vinier*, 125 App. Div. 18, 109 N. Y. Supp. 293.

\$1,000 for imputing criminal intercourse with negro. *Smittey v. Pinch*, 148 Mich. 670, 112 N. W. 868.

\$2,485.50 for charging plaintiff with keeping company with negro. *Luft v. Lingane*, 17 R. I. 420, 22 Atl. 942.

\$2,500 for charge of keeping disorderly house. *Wendt v. Craig*, 17 N. Y. Supp. 748.

\$3,500 for malicious charge of long-continued unchastity with defendant. *Bloomfield v. Pinn*, 84 Neb. 472, 121 N. W. 716.

The following verdicts have been held excessive:

\$3,000, mitigating facts, reduced to \$2,000. *Brooks v. Dutcher*, 22 Neb. 644, 36 N. W. 128; *Bailey v. Kling* (Neb.), 130 N. W. 439.

\$7,000 reduced to \$1,700. *Riker v. Clopton*, 83 App. Div. 310, 82 N. Y. Supp. 65.

<sup>105</sup> The following verdicts have been upheld:

\$200 for charge of theft. *Dallin v. Mayer*, 122 App. Div. 676, 107 N. Y. Supp. 316.

\$437.50 for charge of theft. *Sanborn v. Fickett*, 91 Me. 364, 40 Atl. 66.

\$450 for charge of counterfeiting. *Pellardis v. Journal Printing Co.*, 99 Wis. 156, 74 N. W. 99.

\$500 for charge of rape. *Gilman v. McClatchy*, 111 Cal. 606, 44 Pac. 241.

\$500 for charge of theft. *Fatjo v. Seidel*, 109 La. 699, 33 So. 737.

\$500 for charge of burglary followed by prosecution and arrest. *Plummer v. Johnson*, 70 Wis. 131, 35 N. W. 334.

\$1,458, where prosecution followed and cost \$700. *Provident S. L. A. Soc. v. Johnson*, 99 S. W. 1159, 30 Ky. L. Rep. 1031.

\$1,500 for charge of theft. *S. M. Burgess & Co. v. Patterson*, 106 S. W. 837, 32 Ky. L. Rep. 624.

The following verdicts have been held excessive:

\$1,000 for charge of theft withdrawn in few minutes; reduced to \$500. *Townsley v. Yeutsch* (Ark.), 135 S. W. 882.

\$5,000, charge of embezzlement, no circumstances of aggravation. *Turton v. New York Recorder Co.*, 22 N. Y. Supp. 766.

<sup>106</sup> The following verdicts have been upheld:

\$50 for calling a "cultured" gentleman a "colored" gentlemen. *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970.

\$300 for charging butcher with selling diseased pork. *Mowry v. Raabe*, 89 Cal. 606, 27 Pac. 157.

\$750 for slander in presence of numerous people. *Childs v. Childs*, 49 Wash. 27, 94 Pac. 660.

\$1,500 for distributing circulars calling plaintiff a liar. *Turner v. Stevens*, 8 Utah, 75, 30 Pac. 24.

\$3,000 (reduced from verdict of \$7,500) for libel against business character. *Hines v. Shumaker*, 95 Miss. 477, 52 So. 705.

\$3,500 for charging undertaker with

### § 1336. False imprisonment.

Damages for false imprisonment have not taken a very wide range, except in a few unusual cases. The largest damages allowed to stand on a first trial have been for an imprisonment which involved peculiar defamation, as in an insane asylum or a reformatory for women.<sup>107</sup> In a Kentucky case, *Schneider*

intoxication at funeral of General Grant. *Holmes v. Jones*, 69 Hun, 346, 23 N. Y. Supp. 631.

\$5,000 for charging political corruption. *Meriwether v. Publishers: George Knapp & Co.*, 120 Mo. App. 354, 97 S. W. 257.

\$5,000 for serious charge of fraud. *Jacquelin v. Morning Journal Assoc.*, 57 N. Y. Supp. 299.

\$7,000 for charge of political corruption against judge. *Lauder v. Jones*, 13 N. D. 525, 101 N. W. 907.

The following have been set aside:

\$8,000 for charge of selling impure lead. *Butterworth v. Todd*, 76 N. J. L. 317, 70 Atl. 139.

\$5,000 for charge of dishonesty in profession. *Dennis v. Johnson*, 42 Minn. 301, 44 N. W. 68.

\$4,500 for political corruption. *Evening Post Co. v. Rhea*, 81 S. W. 273, 26 Ky. L. Rep. 375.

\$1,000 for charging school teacher with incompetence, reduced to \$300. *Sherwood v. Kyle*, 125 Cal. 652, 58 Pac. 270.

<sup>107</sup> The following verdicts have been upheld:

\$100, imprisonment 13 days, cost of discharge \$23. *Jacques v. Parks*, 96 Me. 268, 52 Atl. 763.

\$250, arrest for illegal voting. *Thomas v. Henderson*, 125 La. 292, 51 So. 202.

\$250, detained in office 45 minutes, became sick from shock and disgrace. *Kroeger v. Passmore*, 36 Mont. 504, 93 Pac. 805, 14 L. R. A. (N. S.) 988.

\$250, jail for two days, expenses \$40. *Brosde v. Sanderson*, 86 Wis. 368, 57 N. W. 49.

\$350 and \$450, jail for 2½ hours. *Bauman v. Lamont*, 82 Minn. 477, 85 N. W. 236.

\$500 (reduced from \$875), short detention caused by honest mistake. *Dunlevy v. Wolferman*, 106 Mo. App. 46, 79 S. W. 1165.

\$500, arrest for evading fare, son arrested at same time had recovered six cents. *Toomey v. Delaware, L. & W. R. R.*, 4 Misc. 392, 24 N. Y. Supp. 108.

\$500 for imprisonment in ball park one hour, no special damage. *Tolcott v. National Exhibition Co.*, 144 App. Div. 337, 128 N. Y. Supp. 1059.

\$800, public arrest. *Scott v. Com.*, 93 S. W. 668, 29 Ky. L. Rep. 571.

\$800, jail 2½ hours. *Judson v. Rear-don*, 16 Minn. 387.

\$1,000, jail for some time, illness resulted, exemplary damages. *Wheeler & W. M. Co. v. Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571.

\$1,000, publicly searched, health impaired. *Illinois Cent. R. R. v. Wilson*, 103 S. W. 364, 31 Ky. L. Rep. 789.

\$1,000, imprisonment 1½ hours. *Thorp v. Carvalho*, 36 N. Y. Supp. 1.

\$1,000, public arrest, imprisonment till released on *habeas corpus*. *Bollon v. Vellines*, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

\$1,200, publicly searched. *Efroymsen v. Smith*, 29 Ind. App. 451, 63 N. E. 328.

\$1,271, detained three days in detective agency. *Pinkerton v. Snyder*, 87 Ill. App. 76.

\$1,500, imprisonment in an insane asylum. "A sad, silent and fragile little lady, now beyond middle life, wrongfully declared a lunatic, and that

*v. McGill*,<sup>108</sup> an election officer was illegally arrested, was kept in custody three hours, and suffered no unusual indignity and no violence. A verdict of \$4,000 was held excessive.

### § 1337. Malicious prosecution.

In actions for malicious prosecution larger verdicts have been given and allowed to stand than in actions for false imprisonment.<sup>109</sup> In a case in Illinois Mexican Central Railway

of the most repulsive style, shut up in a madhouse, under the circumstances disclosed, and with a stigma branded upon her name and character, . . . with endurance of such shame, humiliation, and crucifixion of soul, as happily does not often fall to a woman's lot." *Bacon v. Bacon*, 76 Miss. 458, 24 So. 968.

\$2,500 for imprisonment seven years in charitable institution for reformation of women and girls. *Gallon v. House of Good Shepherd*, 158 Mich. 361, 122 N. W. 631.

\$2,500, against officer who wantonly made false charge, verdict restored by Supreme Court after being cut down to \$200 by trial court. *Smith v. Macomber*, 28 R. I. 248, 66 Atl. 570.

\$3,000, third verdict. *Union Depot & R. R. v. Smith*, 16 Colo. 361, 27 Pac. 329.

The following verdicts have been held excessive:

\$4,000, imprisonment three hours, no aggravation. *Schneider v. McGill*, 64 S. W. 835, 23 Ky. L. Rep. 587.

\$750, taken to police station and searched, no exemplary damages. *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193.

\$550, arrest for evading fare, no actual damage, circumstances of mitigation, reduced to \$10. *Palmer v. Maine Cent. R. R.*, 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673.

\$500, no humiliation or expense, short imprisonment. *Miller v. Ash-*

*craft*, 98 Ky. 314, 32 S. W. 1085, 17 Ky. L. Rep. 894.

\$400, formal arrest for non-payment taxes, paid at once; judges respectively mentioned \$50, \$100 and \$250 as limit. *Fanjoy v. Portland*, 29 N. B. 24.

\$288, refused to give bonds, asked to be locked up, on reaching jail released; reduced to \$100. *Yost v. Tracy*, 13 Utah, 431, 45 Pac. 346.

<sup>108</sup> 23 Ky. L. Rep. 587, 64 S. W. 835.

<sup>109</sup> The following verdicts have been upheld:

\$70, ten days in jail. *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346.

\$300, no special damages. *Weil v. Israel*, 42 La. Ann. 955, 964, 8 So. 826.

\$400, prosecution for larceny of worthless fence. *Haas v. Powers*, 130 Wis. 406, 110 N. W. 205.

\$450, prosecution for theft of valise. *Orefice v. Savarese*, 113 N. Y. Supp. 175.

\$500, prosecution for stealing horse. *Stephens v. Gravit*, 136 Ky. 479, 124 S. W. 414.

\$500, prosecution to force payment of debt. *Morgan v. Duffy*, 94 Tenn. 686, 30 S. W. 735.

\$550 though not committed to jail. *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.

\$600, no serious inconvenience or expense, exemplary damages. *Henderson v. McGuder* (Ind. App.), 94 N. E. 580.

\$600, imprisoned less than one hour, greatly humiliated. *Charlton v. Markland*, 36 Wash. 40, 78 Pac. 132.

\$780, jail three hours, temporary loss

*v. Gehr* <sup>110</sup> the defendant railway was sued for malicious prosecution and resulting imprisonment in Mexico. Plaintiff was an officer of the company, and was arrested for embezzlement, kept in a Mexican jail for two months, when he was discharged without a trial. The jail was uncomfortable. The plaintiff was a man of excellent family and social connections, fine personal character, and presumably of fine sensibilities. A verdict of \$40,000 was allowed to stand.

of position, some expense. *Fiola v. McDonald*, 85 Minn. 147, 88 N. W. 431.

\$800 exemplary damages. *Merchant v. Piekle*, 10 N. D. 48, 84 N. W. 574.

\$1,000, confined in cell four hours. *Scholl v. Schnebel*, 8 N. Y. Supp. 855.

\$1,000, illness, small expense. *Neys v. Taylor*, 12 S. D. 488, 81 N. W. 901.

\$1,000 exemplary damages. *Eggett v. Allen*, 119 Wis. 625, 96 N. W. 803.

\$1,500, two public arrests and other indignities. *Rule v. McGregor*, 115 Ia. 323, 88 N. W. 814.

\$2,000, jail over night, no injury to reputation. *Finigan v. Sullivan* (Wash.), 118 Pac. 888.

\$2,500 exemplary damages, injury to reputation and business. *Spencer v. Cramblett*, 56 Kan. 794, 44 Pac. 985.

\$6,500. *Evansville & T. H. R. R. v. Talbot*, 131 Ind. 221, 29 N. E. 1134.

\$7,500, few hours in jail, attended court two or three times. *National Surety Co. v. Mabry*, 139 Ala. 217, 35 So. 698.

\$12,500, prosecution for arson to defraud insurance company. *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78.

\$25,000, prosecution of man fifty-five years old, salary \$4,500 per year, cost of defense \$5,000. *Rawson v. Leggett*, 97 App. Div. 416, 90 N. Y. Supp. 5.

The following verdicts have been held excessive:

\$20,000, former verdict \$40,000 set aside, no exemplary damages. *Bell v. Atlantic C. R. R.*, 58 N. J. L. 227, 33 Atl. 211.

\$6,000 reduced from \$8,000, imprisonment twenty-four days. *Fadner v. Filer*, 27 Ill. App. 506.

\$4,500, no imprisonment, plaintiff, an ignorant negro, released on bond, case thrown out by grand jury. *Wright v. Hagerman*, 42 S. W. 917, 19 Ky. L. Rep. 1032.

\$4,000, no exemplary damages, former verdict \$2,800 set aside. *Davis v. McMillan*, 142 Mich. 391, 105 N. W. 862, 3 L. R. A. (N. S.) 928.

\$3,500, in custody one hour, discharged on appearance in court, expense \$50; reduced to \$1,000. *Billingsley v. Maas*, 93 Wis. 176, 67 N. W. 49.

\$3,000, expenses \$150, short arrest, man of bad character. *Davis v. Seeley*, 91 Ia. 583, 60 N. W. 183.

\$2,500, only technical arrest. *O'Boyle v. Shively*, 65 Ill. App. 278.

\$2,000, evading fare, no special or exemplary damages; reduced to \$1,000. *Ruth v. St. Louis Transit Co.*, 98 Mo. App. 1, 71 S. W. 1055.

\$1,000, no exemplary damages. *Cartwright v. Elliott*, 45 Ill. App. 458.

\$1,000, released on bail, attended court three days; \$500 sufficient. *Cointenant v. Cropper*, 41 La. Ann. 303, 6 So. 127.

\$1,000 reduced to \$400. *Bell v. Morse*, 48 Kan. 601, 29 Pac. 1086.

\$500, four days' imprisonment, time and expenses \$20, no special damages. *Sasse v. Rogers*, 40 Ind. App. 197, 81 N. E. 590.

<sup>110</sup> 66 Ill. App. 173.



**§ 1338. Alienation of affections.**

In actions for alienation of affections much depends on the pecuniary and other circumstances of the parties, and a wide range is to be expected in the size of verdicts. For alienation of the affections of a husband, the loss of society and support is a large element.<sup>111</sup> For alienation of the affections of a wife, usually accompanied by seduction, the affection of the husband and the wealth of the seducer may justify large verdicts;<sup>112</sup> while evidence of lack of affection or condonation by husband will prevent the allowance of heavy damages.<sup>113</sup>

**§ 1339. Breach of promise of marriage.**

Damages for breach of promise of marriage depend largely on the wealth of the defendant and upon the fact of seduction, and a large range of damages is therefore to be expected.<sup>114</sup>

<sup>111</sup> The following verdicts have been upheld:

\$1,750. *Wilson v. Coulter*, 29 App. Div. 85, 90, 51 N. Y. Supp. 804.

\$3,000. *White v. White*, 101 Minn. 451, 112 N. W. 627.

\$5,000. *Nichols v. Nichols*, 147 Mo. 387, 401, 48 S. W. 947.

\$5,000, actual and \$1,500 exemplary. *White v. White*, 140 Wis. 538, 122 N. W. 1051.

\$7,500. *Cochran v. Cochran*, 127 App. Div. 319, 111 N. Y. Supp. 588.

\$15,000. *Lockwood v. Lockwood*, 67 Minn. 476, 70 N. W. 784.

The following have been set aside:

\$30,000. *Sivley v. Sivley*, 96 Miss. 137, 51 So. 457.

\$7,000 reduced to \$2,000. *Heisler v. Heisler*, 151 Ia. 503, 127 N. W. 823.

\$2,000, wife did not desire husband's affection. *Van Olinda v. Hall*, 88 Hun, 452, 34 N. Y. Supp. 777.

<sup>112</sup> The following verdicts have been upheld:

\$15,000. *Speck v. Gray*, 14 Wash. 589, 45 Pac. 143.

\$15,000, reduced by trial court to \$10,000. *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343.

\$5,250. *Hartpence v. Rodgers*, 143 Mo. 623, 45 S. W. 650.

<sup>113</sup> The following verdicts have been set aside as excessive:

\$5,000, husband had connived, and had been sent to jail for setting wife on hot stove. *Peek v. Taylor*, 17 Ky. L. Rep. 1312, 34 S. W. 705.

\$5,000, second verdict, lack of affection shown. *Bathke v. Krassin*, 78 Minn. 272, 80 N. W. 950.

<sup>114</sup> The following verdicts have been upheld:

\$1,500, restoring verdict reduced by trial court to \$500, seduction, defendant worth \$3,000. *Halness v. Anderson*, 110 Minn. 204, 124 N. W. 830.

\$5,000. *Kerns v. Hagenbuchle*, 17 N. Y. Supp. 367.

\$8,000, seduction, defendant worth \$16,000. *Lanigan v. Neely*, 4 Cal. App. 760, 89 Pac. 441.

\$8,000, engagement of fourteen years, seduction. *Hanson v. Johnson*, 41 Wis. 550, 124 N. W. 506.

\$16,000, seduction, defendant worth \$50,000 to \$75,000. *Geiger v. Payne*, 102 Ia. 581, 69 N. W. 554.

The following has been set aside:

\$3,500, short engagement, no aggra-

### § 1340. Seduction.

Large damages have been upheld for the seduction of plaintiff's wife<sup>115</sup> or daughter;<sup>116</sup> but even larger damages have been allowed where a woman sued under a statute for her own seduction.<sup>117</sup>

### § 1341. Telegraph companies.

In jurisdictions where recovery is allowed for mental suffering for delay in delivering telegrams, or for non-delivery, many cases have been presented for determining the excessiveness of damages. A frequent cause of action has arisen from delay in messages announcing illness or death, so that the plaintiff was unable to arrive at the bedside of a relative before unconsciousness or death,<sup>118</sup> or was unable to be present at the funeral of a relative. The recovery in the latter case seems to

vation, defendant worth \$6,000. *Kellett v. Robie*, 99 Wis. 303, 74 N. W. 781.

<sup>115</sup> The following verdicts have been upheld:

\$3,000. *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006.

\$4,275. *Dorman v. Sebree*, 21 Ky. L. Rep. 634, 52 S. W. 809.

<sup>116</sup> The following verdicts have been upheld:

\$1,200. *Thiebault v. Prendergast* (R. I.), 69 Atl. 922.

\$3,000. *Riddle v. McGinnis*, 22 W. Va. 253.

\$3,500. *Kerns v. Hagenbuehle*, 17 N. Y. Supp. 369.

<sup>117</sup> \$25,000 not excessive. *Marshall v. Taylor*, 98 Cal. 55, 32 Pac. 867, 35 Am. St. Rep. 14.

<sup>118</sup> The following verdicts have been upheld:

\$300. *Western U. T. Co. v. Gillis*, 97 Ark. 226, 133 S. W. 833.

\$500. *Western U. T. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80.

\$500. *Arkansas & L. Ry. v. Stroude*, 82 Ark. 117, 100 S. W. 760.

\$955.50. *Western U. T. Co. v. Price*, 137 Ky. 758, 126 S. W. 1100, 29 L. R. A. (N. S.) 836.

\$1,000. *Western U. T. Co. v. Blackmer*, 82 Ark. 526, 102 S. W. 366.

\$1,150. *Western U. T. Co. v. Bennett* (Tex. Civ. App.), 124 S. W. 151.

\$1,200. *Western U. T. Co. v. Cobb* (Tex. Civ. App.), 118 S. W. 717.

\$1,950. *Western U. T. Co. v. Zane*, 6 Tex. Civ. App. 585, 25 S. W. 722.

\$1,995. *Western U. T. Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354.

\$2,000. *Western U. T. Co. v. Houghton* (Tex. Civ. App.), 26 S. W. 448.

\$2,150. *Western U. T. Co. v. Piner*, 9 Tex. Civ. App. 152, 29 S. W. 66.

\$2,500. *Western U. T. Co. v. Evans*, 5 Tex. Civ. App. 55, 23 S. W. 998.

The following verdicts have been held excessive:

\$5,000. *Western U. T. Co. v. Evans*, 1 Tex. Civ. App. 297, 21 S. W. 266.

\$4,750. *Western U. T. Co. v. Piner*, 1 Tex. Civ. App. 301, 21 S. W. 315.

\$1,250, could not have arrived before father became unconscious, reduced to \$500. *Western U. T. Co. v. Bouchell*, 28 Tex. Civ. App. 23, 67 S. W. 159.

\$900, delay of several days, but reached bedside thirty-six hours before death. *Newport N. & M. V. R. R. v. Griffin*, 92 Tenn. 694, 22 S. W. 737.

have been graduated according to the relationship.<sup>119</sup> In other cases also the excessiveness of damages allowed against a telegraph company has been brought in question.<sup>120</sup>

### § 1342. Carriers.

For any misuse of a passenger by a carrier the damages are partly non-pecuniary, leaving the assessment to the judgment of a jury; and the question of excessiveness is often presented. Thus the court has had to pass upon the damages in cases where a carrier failed to stop to take on a passenger,<sup>121</sup> or failed to stop the conveyance and leave him at his destination, thus

<sup>119</sup> The following verdicts have been upheld:

\$400.25 (brother). *Western U. T. Co. v. Bell*, 48 Tex. Civ. App. 359, 106 S. W. 1147.

\$500 (brother). *Western U. T. Co. v. Hill* (Tex. Civ. App.), 26 S. W. 252.

\$700 (brother). *Western U. T. Co. v. Thompson*, 18 Tex. Civ. App. 279, 44 S. W. 402.

\$1,000 (wife). *Western U. T. Co. v. Fuel*, 165 Ala. 391, 51 So. 571.

\$1,000 (brother). *Western U. T. Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. L. Rep. 497, 12 L. R. A. (N. S.) 748.

\$1,350 (father). *Western U. T. Co. v. McDavid* (Tex. Civ. App.), 121 S. W. 893.

\$2,000 (mother). *Western U. T. Co. v. Hardison* (Tex. Civ. App.), 101 S. W. 541.

The following were set aside:

\$1,354 (brother). *Western U. T. Co. v. Weniski*, 84 Ark. 457, 106 S. W. 486.

\$750 (son), could not have arrived till after decomposition set in; reduced to \$350. *Western U. T. Co. v. Rhine*, 90 Ark. 57, 117 S. W. 1069.

<sup>120</sup> The following verdicts have been upheld:

\$100, plaintiff not met on arrival at station, suffered inconvenience. *Western U. T. Co. v. Karr*, 5 Tex. Civ. App. 60, 24 S. W. 302.

\$450, plaintiff told both parents dead

instead of only one. *Western U. T. Co. v. Taylor*, 122 S. W. 131.

\$750, plaintiff traveling with body of deceased child not met on arrival at station. *Western U. T. Co. v. Giffin*, 27 Tex. Civ. App. 306, 65 S. W. 661.

The following verdicts have been held excessive:

\$1,999.99 for delay in getting physician for sick child. *Western U. T. Co. v. Berdine*, 2 Tex. Civ. App. 577, 21 S. W. 982.

\$1,000 for delaying information of mother's condition; reduced to \$500. *Western U. T. Co. v. Hiller*, 93 Miss. 658, 47 So. 377.

\$345 for causing necessity of hack ride for 20 miles. *Western U. T. Co. v. Collins*, 156 Ala. 333, 47 So. 61.

<sup>121</sup> The following verdicts have been upheld:

\$100, plaintiff forced to walk home, took all night. *Indiana U. T. Co. v. Heller*, 44 Ind. App. 385, 89 N. E. 419.

\$250, physician on way to see patients. *Southern Ry. v. Wallis*, 133 Ga. 553, 66 S. E. 370, 30 L. R. A. (N. S.) 401.

The following have been set aside as excessive:

\$1,500, no special damages, exemplary damages allowed. *Memphis & C. R. R. v. Green*, 52 Miss. 779.

\$1,000, caught in rain and became sick. *Burns v. Alabama & V. R. R.*, 93 Miss. 186, 47 So. 640.

compelling him to return from the place where he was left,<sup>122</sup> or where it failed to carry him through to his destination.<sup>123</sup> For wrongful expulsion of a passenger the damages may be affected by the humiliating circumstances of the expulsion,<sup>124</sup> the insulting or violent language or conduct of the conductor,<sup>125</sup> or

<sup>122</sup> The following verdicts have been upheld:

\$75, carried two miles, exposure and illness. *St. Louis, I. M. & S. R. R. v. Knight*, 81 Ark. 429, 99 S. W. 684.

\$150, including exemplary damages. *Birmingham R. L. & P. Co. v. Nolan*, 134 Ala. 329, 32 So. 715.

\$500, including exemplary damages, carried three-fourths mile beyond station at night in rain. *Higgins v. Louisville & N. R. R.*, 64 Miss. 80, 8 So. 176.

\$1,000, where passenger was injured while walking back. *Winkler v. St. Louis, I. M. & S. R. R.*, 21 Mo. App. 99.

\$1,000, including exemplary damages, conductor used profane and insulting language. *Fordyce v. Nix*, 58 Ark. 136, 23 S. W. 967.

\$1,500, exposure caused illness. *St. Louis, I. M. & S. Ry. v. Day*, 86 Ark. 104, 110 S. W. 220.

The following verdicts have been held excessive:

\$1,750, insulted, walked half mile, made nervous. *North Alabama Trac. Co. v. Daniel*, 158 Ala. 414, 48 So. 50.

\$1,000, walked back at night over trestle and was frightened; reduced to \$500. *Texas & P. Ry. v. Mansell* (Tex. Civ. App.), 23 S. W. 549.

\$300, no special damages. *Southern R. R. v. Bryant*, 105 Ga. 316, 31 S. E. 182.

<sup>123</sup> \$210, upheld, dark night, walk of several miles. *Gulf, C. & S. F. Ry. v. Sain* (Tex. Civ. App.), 24 S. W. 958.

\$300, excessive, reduced to \$200. *Moss v. Missouri Pac. Ry.*, 128 Mo. App. 385, 107 S. W. 422.

<sup>124</sup> The following verdicts have been upheld where there were circumstances of humiliation:

\$60. *Dalton v. Beers*, 38 Conn. 529.

\$200, where walked six miles in rain. *Fordyce v. Manuel*, 82 Tex. 527, 18 S. W. 657.

\$250, boy of thirteen, only thirty yards from starting point. *St. Louis S. W. R. R. v. Furlow*, 81 Ark. 496, 99 S. W. 689.

\$500. *Cagney v. Manhattan R. R.*, 2 N. Y. Supp. 410.

\$500, *Houston & T. C. R. R. v. Lee* (Tex. Civ. App.), 123 S. W. 154.

\$650, walked five miles. *Chamberlain v. Lake Shore & M. S. R. R.*, 122 Mich. 477, 81 N. W. 339.

The following verdicts have been held excessive:

\$5,000. *Warner v. Southern Pac. Co.*, 113 Cal. 105, 45 Pac. 187, 54 Am. St. Rep. 327.

\$4,000. *Elser v. Southern Pac. Co.*, 7 Cal. App. 493, 94 Pac. 852.

\$1,900; reduced to \$500. *Willson v. Northern Pac. R. R.*, 5 Wash. 621, 32 Pac. 468.

\$1,400, expulsion of woman causing great nervous suffering; reduced to \$400. *Sloane v. Southern California R. R.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193.

\$900, expulsion from Pullman car. *Pullman Co. v. Custer* (Tex. Civ. App.), 140 S. W. 847.

\$500. *Camden I. Ry. v. Frazier*, 97 S. W. 776, 30 Ky. L. Rep. 186.

\$390. *Atchison, T. & S. F. R. R. v. Hogue*, 50 Kan. 40, 31 Pac. 698.

<sup>125</sup> The following verdicts were upheld where the carrier's servants were insulting or used unnecessary violence:

\$150 reduced to \$100. *Brown v. Minneapolis & S. P. S. Ry.*, 102 Minn. 298, 113 N. W. 895.

\$299.54. *Wightman v. Chicago &*

the inconvenience of the place where the passenger is expelled; <sup>126</sup> or by serious injuries supervening on the expulsion; <sup>127</sup> but if there are no circumstances of aggravation, large damages will not be allowed, <sup>128</sup> unless exemplary damages may be al-

N. R. R., 73 Wis. 169, 40 N. W. 689, 9 Am. St. Rep. 778, 2 L. R. A. 185.

\$300. *Southern Pac. Co. v. Craner* (Tex. Civ. App.), 101 S. W. 534.

\$100 actual and \$300 exemplary. *Short v. St. Louis & S. F. R. R. (Mo.)*, 130 S. W. 489.

\$500. *Atchison, T. & S. F. R. R. v. Cuniffe* (Tex. Civ. App.), 57 S. W. 692.

\$1,000. *Chesapeake & O. R. R. v. Osborne*, 97 Ky. 112, 30 S. W. 21, 53 Am. St. Rep. 407.

\$1,250. *Gulf, C. & S. F. Ry. v. Moore* (Tex. Civ. App.), 39 S. W. 987.

\$1,500, serious personal injuries, exemplary damages. *St. Louis, I. M. & S. Ry. v. Mynott*, 83 Ark. 6, 102 S. W. 380.

\$1,500, walk of thirty miles after imprisonment. *Trabing v. California N. & I. Co.*, 133 Cal. xx, 65 Pac. 478.

\$6,000, leg broken. *Singleton v. Southwestern R. R.*, 70 Ga. 464.

The following verdicts were held excessive:

\$2,500; reduced to \$750. *Mobile, J. & K. C. R. R. v. Kranfield*, 92 Miss. 494, 46 So. 71.

\$1,000; reduced to \$100. *Missouri, K. & T. Ry. v. Mitchell*, 47 Tex. Civ. App. 307, 105 S. W. 827.

<sup>126</sup> The following verdicts were upheld where inconvenience or physical injury resulted from the expulsion:

\$50. *Durfee v. Union Pac. Ry.*, 9 Utah, 213, 33 Pac. 944.

\$287. *Birmingham R. L. & P. Co. v. Turner*, 154 Ala. 542, 45 So. 671.

\$425. *South Covington & C. S. Ry. v. Quinn*, 110 S. W. 404, 33 Ky. L. Rep. 534.

\$1,500. *Texas & P. R. R. v. Lynch* (Tex. Civ. App.), 73 S. W. 65.

The following verdicts were held excessive, in spite of resulting discomfort or physical injury:

\$1,000; reduced to \$100. *St. Louis, I. M. & S. Ry. v. Woodruff*, 89 Ark. 9, 115 S. W. 953.

\$850. *Masterson v. Chicago & N. W. R. R.*, 102 Wis. 571, 78 N. W. 757.

\$750. *Gillen v. Minneapolis, S. P. & S. S. M. Ry.*, 91 Wis. 633, 65 N. W. 373.

\$500; reduced to \$250. *Gulf, C. & S. F. R. R. v. St. John*, 13 Tex. Civ. App. 257, 35 S. W. 501.

\$250. *McLean v. Chicago, S. P. M. & O. Ry.*, 50 Minn. 485, 52 N. W. 966.

\$200. *Howe v. Gibson*, 3 Tex. Civ. App. 263, 22 S. W. 826.

<sup>127</sup> Where the expulsion caused serious physical injury the following verdicts have been upheld:

\$2,500. *Flavin v. Chicago, B. & Q. R. R.*, 43 Mont. 220, 115 Pac. 667.

\$10,000. *Chicago U. T. Co. v. Brethauer*, 125 Ill. App. 204, affirmed, 223 Ill. 521, 79 N. E. 287.

A verdict of \$1,000 was held excessive, and was reduced to \$500. *Shannon v. Northern Pac. Ry.*, 44 Wash. 321, 87 Pac. 351.

<sup>128</sup> The following verdicts have been upheld where there were no special circumstances of aggravation:

\$150. *Gileson v. Minneapolis & St. L. R. R.*, 85 Minn. 329, 88 N. W. 970.

\$175. *Arnold v. Rhode Island Co.*, 28 R. I. 118, 163, 66 Atl. 60.

\$200. *Chicago, St. L. & P. R. R. v. Holdbridge*, 118 Ind. 281, 20 N. E. 837.

\$300. *Pnettplace v. Northern Pac. R. R.*, 84 Wis. 412, 54 N. W. 1092.

\$500. *Marlow v. Southern Pac. Co.*, 151 Cal. 383, 90 Pac. 928.

lowed.<sup>129</sup> Large damages have also been allowed for abuse, assault, or other injury to passengers by servants of the carrier<sup>130</sup>

\$500. *Monnier v. New York Cent. & H. R. R.*, 70 App. Div. 405, 75 N. Y. Supp. 521.

\$4,000, former verdict for \$5,000 set aside. *Peck v. New York C. & H. R. R.*, 8 Hun, 286.

The following verdicts have been held excessive:

\$1,500. *Cunningham v. Seattle Electric R. & P. Co.*, 3 Wash. 471, 28 Pac. 745.

\$1,300. *Comer v. Foley*, 98 Ga. 678, 25 S. E. 671.

\$1,000. *Terre Haute, A. & St. L. R. R. v. Vanatta*, 21 Ill. 188, 74 Am. Dec. 96.

\$800. *Olson v. Northern Pac. R. R.*, 49 Wash. 626, 96 Pac. 150, 18 L. R. A. (N. S.) 209.

\$759. *Brian v. Oregon S. L. R. R.*, 40 Mont. 109, 105 Pac. 489.

\$750, reduced by trial court from \$1,500; further reduced to \$400. *Gillen v. Minneapolis, St. P. & S. S. M. R. R.*, 91 Wis. 633, 65 N. W. 373.

\$500. *Louisville & N. R. R. v. Breckinridge*, 99 Ky. 1, 34 S. W. 702.

\$500. *Finch v. Northern Pac. R. R.*, 47 Minn. 36, 49 N. W. 329.

\$400. *Cincinnati, N. O. & T. P. R. R. v. Carson (Ky.)*, 140 S. W. 71.

\$250. *St. Louis, I. M. & S. Ry. v. Woodard*, 69 Ark. 659, 64 S. W. 263.

<sup>129</sup> The following verdicts, including exemplary damages, have been upheld:

\$1,325. *Louisville City R. R. v. Mercer*, 11 Ky. L. Rep. 810.

\$2,000. *Louisville & N. R. R. v. Wilkinson*, 15 Ky. L. Rep. 92.

The following verdict has been held excessive:

\$750. *Georgia R. & B. Co. v. Eskew*, 86 Ga. 641, 12 S. E. 106, 22 Am. St. Rep. 490.

<sup>130</sup> The following verdicts have been upheld:

\$250, conductor cursed and threatened woman. *St. Louis S. W. Ry. v. Granger (Tex. Civ. App.)*, 100 S. W. 987.

\$50 actual and \$450 exemplary; brakeman knocked passenger down and kicked him in mouth. *Cathey v. St. Louis & S. F. R. R. (Mo.)*, 130 S. W. 130.

\$500, conductor insulted passenger and struck him in face. *Coorman v. Brooklyn Heights R. R.*, 127 App. Div. 315, 111 N. Y. Supp. 531.

\$750, conductor cursed and threatened. *Cincinnati, N. O. & T. P. Ry. v. Strosnider*, 121 S. W. 971.

\$1,000, passenger insulted and imprisoned on steamboat. *Ragland v. Norfolk & Washington (D. C.) Steamboat Co.*, 163 Fed. 376.

\$1,000, eyes and nose bruised. *Sweeney v. Chicago City Ry.*, 148 Ill. App. 351.

\$1,000. *Missouri, K. & T. R. R. v. Gaines*, 35 Tex. Civ. App. 257, 79 S. W. 1104.

\$1,000, conductor kissed passenger. *Craker v. Chicago & N. W. R. R.*, 36 Wis. 657, 17 Am. Rep. 504.

\$2,000, driver criminally assaulted female passenger. *Beardmore v. Barton*, 108 Minn. 28, 121 N. W. 228.

\$2,500, negro servant insulted woman passenger. *Gulf, C. & S. F. Ry. v. Luther*, 40 Tex. Civ. App. 517, 90 S. W. 44.

\$2,500, badly beaten. *Birmingham R. & E. Co. v. Baird*, 130 Ala. 334, 30 So. 456.

\$2,500, left hand crippled. *Louisville & N. R. R. v. Ray*, 101 Tenn. 1, 46 S. W. 554.

\$5,000, operation required. *Nien-*

or by third persons through lack of protection by the carrier's servants,<sup>131</sup> and for failure of the carrier to provide proper accommodations.<sup>132</sup> Verdicts have also been considered in actions for other injuries by a carrier to passenger.<sup>133</sup>

*dorff v. Manhattan Ry.*, 4 App. Div. 46, 38 N. Y. Supp. 690.

In the following cases the verdicts were held excessive:

\$1,500; reduced to \$1,000. *Doran v. Brooklyn & N. Y. F. Co.*, 19 N. Y. Supp. 172.

\$1,000, a former verdict of \$7,000 having previously been set aside. *Georgia S. & F. Ry. v. Ransom*, 5 Ga. App. 740, 68 S. E. 943.

\$1,000. *Mitchell v. United Rys.*, 125 Mo. App. 1, 102 S. W. 661.

\$900; reduced to \$100. *Texas N. O. R. R. v. Marshall* (Tex. Civ. App.), 140 S. W. 508.

\$500; reduced to \$100. *Burfeindt v. New York City Ry.*, 52 Misc. 651, 101 N. Y. Supp. 589.

\$123. *Mueller v. Chicago, B. & N. R. R.*, 75 Minn. 109, 77 N. W. 566.

<sup>131</sup> The following verdicts have been upheld:

\$200, reduced from \$300. *Jansen v. Minneapolis & S. L. R. R.*, 112 Minn. 496, 128 N. W. 826, 32 L. R. A. (N. S.) 1206.

\$250. *Lucy v. Chicago G. W. Ry.*, 64 Minn. 7, 65 N. W. 944, 31 L. R. A. 551.

\$1,000. *Richmond & D. R. R. v. Jefferson*, 89 Ga. 554, 17 L. R. A. 571, 16 S. E. 69.

\$2,000. *Savannah St. R. R. v. Bryan*, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 748.

The following verdicts have been held excessive:

\$18,000. *Louisville & N. R. R. v. McEwan*, 31 S. W. 465, 17 Ky. L. Rep. 406.

\$15,000; reduced to \$5,000. *The Western States*, 151 Fed. 929.

\$7,125. *Louisville Ry. v. Welling-ton*, 126 S. W. 370, 137 Ky. 719.

\$1,000; reduced to \$500. *Whitlock v. Northern Pac. Ry.*, 59 Wash. 15, 109 Pac. 188.

<sup>132</sup> The following verdicts have been upheld:

\$700, blind man with first-class ticket put in smoking car and made ill. *Louisville & N. R. R. v. Weathers*, 163 Ala. 48, 50 So. 268.

\$750 for exclusion from sleeping car. *Braum v. Webb*, 32 Misc. 243, 65 N. Y. Supp. 668.

\$900 for failure to reserve berth for sick lady. *Pullman P. C. Co. v. Nelson*, 22 Tex. Civ. App. 223, 54 S. W. 624.

\$1,800, married woman insulted and threatened with ejection from berth. *Cincinnati, N. O. & T. P. R. R. v. Harris*, 115 Tenn. 501, 91 S. W. 211, 5 L. R. A. (N. S.) 779.

The following verdicts have been held excessive.

\$1,150, defendant suffering with rheumatism not allowed to occupy berth during day. *Pullman P. C. Co. v. Fowler*, 6 Tex. Civ. App. 755, 27 S. W. 268.

\$1,000, compelling white woman to ride sixty miles in negro coach; reduced to \$100. *Missouri, K. & T. R. R. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327.

\$500, failure to reserve berth. *Pullman Co. v. Pennock*, 118 Tenn. 565, 102 S. W. 73.

<sup>133</sup> The following verdicts have been upheld:

\$50 for leaving passenger at intermediate station. *St. Louis S. W. Ry. v. Germany* (Tex. Civ. App.), 56 S. W. 586.

\$500 for failure to notify woman passenger to change cars. *Central of Ga. Ry. v. Ashley*, 159 Ala. 145, 48 So. 981.

As an example of extreme cases, a verdict of \$50.00 was held not excessive where a passenger was compelled to get off and walk a short distance in the mud.<sup>134</sup> And where a conductor made a vicious and unprovoked assault on a passenger with a switch iron, giving him a long wound on the skull, a fracture of the skull, a blood tumor on the eye, causing loss of memory, change of disposition, and permanent injury, and exemplary damages were recoverable for the malice, \$5,000 compensatory and \$2,000 exemplary damages were held not to be excessive.<sup>135</sup>

### § 1343. Other malicious torts, or wrongs causing mental suffering.

For other malicious torts large verdicts have been allowed, as for malicious attachment,<sup>136</sup> malicious eviction from premises,<sup>137</sup> malicious discharge from employment<sup>138</sup> or expulsion from a beneficial order,<sup>139</sup> or wrongful invasion of privacy.<sup>140</sup> And damages have been considered for removing the body of a

\$1,500 for misinformation about route. *Southern Ry. v. Nowlin*, 156 Ala. 222, 47 So. 180.

\$2,500 for delay. *Southern Ry. v. Miller*, 120 S. W. 278 (Ky.).

\$5,500 (reduced from \$8,500) for causing passenger on alighting to fall through a trestle. *Burnside v. Minneapolis & St. L. Ry.*, 110 Minn. 401, 125 N. W. 895.

The following verdicts have been held excessive:

\$750 for delay; reduced to \$100. *LeClaire v. Tacoma R. & P. Co.*, 62 Wash. 157, 113 Pac. 268.

\$640 for delay in shipping corpse. *Louisville & N. R. R. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 711.

<sup>134</sup> *City & S. Ry. v. Brauss*, 70 Ga. 368.

<sup>135</sup> *Neuer v. Metropolitan St. Ry.*, (Mo.), 127 S. W. 669.

<sup>136</sup> The following verdicts have been upheld:

\$996. *Friedly v. Giddings*, 119 Fed. 438.

\$5,000. *Union Mill Co. v. Prentzler*, 100 Ia. 540, 69 N. W. 876.

<sup>137</sup> The following verdicts have been upheld:

\$200. *Evertson v. Sutton*, 5 Wend. (N. Y.) 583.

\$400. *Wood v. Young*, 20 Ky. L. Rep. 1931, 50 S. W. 541.

\$800. *Walterscheid v. Crupper*, 79 Kan. 627, 100 Pac. 623.

\$6,500. *O'Conner v. Parrott*, 22 Ill. App. 429.

<sup>138</sup> \$1,200 not excessive. *Gibson v. Fidelity & Casualty Co.*, 232 Ill. 49, 83 N. E. 539, affirming 135 Ill. App. 290.

<sup>139</sup> \$500 actual and \$2,500 exemplary damages not excessive. *St. Louis S. W. Ry. v. Thompson* (Tex. Civ. App.), 108 S. W. 453.

<sup>140</sup> \$1,000 not excessive. *Rhodes v. Sperry & Hutchinson Co.*, 120 App. Div. 467, 104 N. Y. Supp. 1102.



child from a cemetery,<sup>141</sup> for expulsion from a theatre,<sup>142</sup> for abandonment of an obstetrical case by physician.<sup>143</sup>

### § 1344. Exemplary damages.

Even where exemplary damages are allowed, the amount of them is not entirely within the power of the jury, and the court will see to it that they bear some relation to the actual damages; if the amount is out of all proper proportion to the actual damages the verdict will be set aside as excessive.<sup>144</sup>

### § 1345. Assault and battery.

For intentional injury by assault and battery the circumstances may lead to large damages for mental suffering.<sup>145</sup>

<sup>141</sup> \$1,700 excessive. *Bessemer L. & I. Co. v. Jenkins*, 111 Ala. 135, 18 So. 565.

<sup>142</sup> \$250 not excessive. *Weber-Stair Co. v. Fisher*, 119 S. W. 195 (Ky. L. Rep.).

<sup>143</sup> \$2,000 not excessive. *Lathrope v. Flood*, 135 Cal. 458, 63 Pac. 1007.

<sup>144</sup> The following verdicts for exemplary damages have been held excessive because out of proportion to the actual damages:

\$1,000 for trespass on premises of a total value of little over \$1,000. *Cobb v. Johnson* (Tex. Civ. App.), 105 S. W. 847.

\$225, actual damages \$25. *Texas L. & C. Co. v. Nations* (Tex. Civ. App.), 63 S. W. 915.

\$800, actual damages \$37. *Ahrens v. Fenton*, 138 Ia. 559, 115 N. W. 233.

\$2,344, actual damages \$56. *Flanary v. Wood*, 32 Tex. Civ. App. 250, 73 S. W. 1072.

\$4,950, actual damages \$25. *Page v. Yool*, 28 Colo. 464, 65 Pac. 636.

\$10,000, actual damages \$200. *International & G. N. Ry. v. Telephone & Tel. Co.*, 69 Tex. 277, 5 S. W. 517, 5 Am. St. Rep. 74.

The following verdicts for exemplary damages were allowed:

\$50, actual damages \$35. *Lister v.*

*Campbell* (Tex. Civ. App.), 46 S. W. 876.

\$1,500, actual damages \$800. *Summers v. Keller*, 152 Mo. App. 626, 133 S. W. 1180.

\$2,500, actual damages \$500. *St. Louis S. W. Ry. v. Thompson* (Tex. Civ. App.), 108 S. W. 453.

In *Bentley v. Fischer L. & M. Co.*, 51 La. Ann. 451, 25 So. 262, exemplary damages of \$5,000 where the actual damages were \$500 were held sufficient.

<sup>145</sup> The following verdicts have been upheld:

\$100, wrist broken. *Peterson v. Toner*, 80 Mich. 350, 45 N. W. 346.

\$225. *Schmitz v. Kirchan*, 32 Wash. 546, 73 Pac. 678.

\$300. *Matthews v. Gray* (Ky.), 137 S. W. 517.

\$350, malicious assault by man on boy. *Fleming v. Loughren*, 139 Ia. 517, 115 N. W. 506.

\$400. *Faulkner v. Davis*, 38 S. W. 1049, 18 Ky. L. Rep. 1004.

\$450, malicious assault by man on boy. *Hollins v. Gorham*, 66 S. W. 823, 23 Ky. L. Rep. 2185.

\$450 exemplary damages. *August v. Finnerty*, 30 Oh. Cir. Ct. 330.

\$200 actual and \$300 exemplary. *McMillen v. Elder* (Mo. App.), 140 S. W. 917.

This is especially true in the case of indecent assault upon a woman,<sup>146</sup> or in the case of illegal search of the person.<sup>147</sup> Where the defendant, while running his saloon on Sunday in violation of law, made an assault on the plaintiff which broke his jaw, made it necessary to employ surgical aid, and caused

\$500 exemplary damages. *Coal B. E. Ry. v. Young*, 126 Ill. App. 651.

\$500, assault of man on child. *Moore v. Sturm*, 88 Neb. 793, 130 N. W. 581.

\$570, aggravated case. *Smith v. Flannery*, 69 Hun, 615, 23 N. Y. Supp. 201.

\$900, pain, and serious injury to hip. *Williams v. Williams*, 132 Mo. App. 266, 111 S. W. 837.

\$1,000, including exemplary damages, defendant publicly spit in plaintiff's face. *Alcorn v. Mitchell*, 63 Ill. 553.

\$1,000, plaintiff maimed. *Slater v. Rink*, 18 Ill. 527.

\$1,000, patient in hospital injured by demented patient. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219.

\$1,000, wanton assault in dining-room of hotel, exemplary damages. *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

\$1,250, malicious and unprovoked battery on sick woman, exemplary damages. *Chicago C. T. Co. v. Mahoney*, 230 Ill. 562, 82 N. E. 868, affirming 131 Ill. App. 591.

\$2,000, gunshot wound. *James v. Hayes*, 63 Kan. 133, 65 Pac. 241.

\$2,000, plaintiff a minister. *Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598.

\$2,500, serious injury in public place. *Rand v. Butte E. Ry.*, 40 Mont. 398, 107 Pac. 87.

\$2,500, plaintiff rendered insane. *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060.

\$4,500, severe injury to seaman. *Bolden v. Jensen*, 70 Fed. 505.

\$5,000, pain, eyesight impaired.

*Doerhoefer v. Shewmaker*, 97 S. W. 7, 29 Ky. L. Rep. 1193.

The following verdicts have been held excessive:

\$5,000 for overcoming resistance of girl to entry on land. *East Jersey Co. v. Slingerland*, 58 N. J. L. 411, 33 Atl. 843.

\$2,000, slight injury. *St. Peter v. Iowa Tel. Co.*, 151 Ia. 294, 131 N. W. 2.

\$2,000, assault with whip. *Goetz v. Ambbs*, 22 Mo. 170.

\$1,000 for insulting assault on man of poor character; reduced to \$300. *Matson v. Matson*, 105 Me. 152, 73 Atl. 867.

\$600, slight injury. *Nagle v. Cohn* (R. I.), 67 Atl. 419.

<sup>146</sup> The following verdicts were upheld:

\$500. *Bruske v. Neugent*, 116 Wis. 488, 93 N. W. 454.

\$700 after former verdicts of \$500 and \$510 had been set aside. *Ragsdale v. Ezell*, 20 Ky. L. Rep. 1567, 49 S. W. 775.

A verdict of \$3,000 was held excessive, and reduced to \$1,500. *Kurpge- weit v. Kirby*, 88 Neb. 72, 129 N. W. 127.

<sup>147</sup> The following verdicts were upheld:

\$800. *Kress v. Lawrence*, 158 Ala. 652, 47 So. 574.

\$2,500. *Doane v. Anderson*, 15 N. Y. Supp. 459.

A verdict of \$1,000 was held excessive where a woman, accused of taking property, went to the office and stayed there some time in order to get back her property. *Fair v. Himmel*, 50 Ill. App. 215.

an expense of \$225, and loss of time, a verdict of \$482 was held not excessive.<sup>148</sup> Where a woman while in a delicate state of health was wrongfully ejected from a house in bad weather, at night, and was compelled to seek shelter with a neighbor, a verdict of \$6,000 actual and \$1,000 exemplary damages was held not excessive.<sup>149</sup> In *Pullman Palace Car Co. v. Lawrence*<sup>150</sup> a verdict for \$15,000 as compensatory and exemplary damages for an assault on a passenger was upheld; and in *Nirsing v. Smith*<sup>151</sup> a verdict for \$45,000 was allowed to stand where the defendant murderously assaulted his son-in-law with a shot-gun, seriously disabling him.

**§ 1346. Physical injury—Doubtful physical consequences.**

Where the plaintiff seeks compensation for alleged injurious consequences of an injury, and the court feels serious doubt whether the damage suffered was in reality a consequence of the injury, this doubt may be considered in passing upon a motion to set aside the verdict as excessive.<sup>152</sup>

**§ 1347. Slight or temporary injury.**

For a slight or temporary injury small verdicts have been held not excessive, and even in a few cases large verdicts, where the injury, though temporary and curable, is severe;<sup>153</sup>

<sup>148</sup> *Bicknese v. Brandl*, 46 Ind. App. 269, 91 N. E. 41.

<sup>149</sup> *Redfield v. Redfield*, 75 Iowa, 435, 39 N. W. 688.

<sup>150</sup> 74 Miss. 782, 22 So. 53.

<sup>151</sup> 222 Pa. 8, 70 Atl. 906.

<sup>152</sup> Where serious doubt was felt by the court as to whether an alleged consequence had followed from the injury, the following verdicts were held excessive:

\$7,000; reduced to \$2,500. *Wellman v. Metropolitan St. Ry.*, 219 Mo. 126, 118 S. W. 31.

\$5,000. *Louisville Ry. v. Roser*, 122 S. W. 149.

\$5,000; reduced to \$3,000. *Briscoe v. Metropolitan St. Ry.*, 222 Mo. 104, 120 S. W. 1162.

\$4,250. *Webb v. Minneapolis St. Ry.*, 107 Minn. 282, 119 N. W. 955.

\$4,060. *Johnson v. Great N. Ry.*, 107 Minn. 285, 119 N. W. 1061.

\$4,000; reduced to \$1,000. *Pate v. Columbia & P. S. R. R.*, 52 Wash. 166, 100 Pac. 324.

\$3,500; reduced to \$2,000. *Billings v. Snohomish*, 51 Wash. 135, 98 Pac. 107.

\$2,000; reduced to \$1,200. *Reynolds v. Smith*, 148 Ia. 264, 127 N. W. 192.

Anything over \$1,000. *Schierloh v. Interurban St. Ry.*, 115 App. Div. 455, 101 N. Y. Supp. 437.

<sup>153</sup> For a slight or temporary injury the following verdicts have been upheld:

\$200. *Tanzer v. New York C. Ry.*, 46 Misc. 86, 91 N. Y. Supp. 334.

\$250. *Anderson v. Sparks*, 142 Wis. 398, 125 N. W. 925.

but in general large verdicts have not been sustained for merely temporary injuries.<sup>154</sup>

\$300. *Sheyer v. Lowell*, 134 Cal. 357, 66 Pac. 307.

\$300. *Evansville El. Ry. v. Lerch*, 40 Ind. App. 147, 81 N. E. 225.

\$300. *Riley v. Iowa Falls*, 83 Ia. 761, 50 N. W. 33.

\$300. *Illinois Cent. R. R. v. Tandy*, 107 S. W. 715, 32 Ky. L. Rep. 962.

\$300. *Segerstrom v. Lawrence* (Wash.), 116 Pac. 876.

\$350. *Barry v. Kurshan*, 103 N. Y. Supp. 120.

\$400. *Louisville & A. R. R. v. Davis*, 96 S. W. 533, 29 Ky. L. Rep. 846.

\$441.67. *Hignett v. Norridgewock*, 105 Me. 189, 73 Atl. 1086.

\$450. *St. Louis, I. M. & S. Ry. v. Grimsley*, 90 Ark. 64, 117 S. W. 1064.

\$466.66. *Vindas v. Dering Coal Co.*, 145 Ill. App. 528.

\$500. *St. Louis, I. M. & S. Ry. v. Fambro*, 88 Ark. 12, 114 S. W. 230.

\$500. *Morton v. Pusey*, 237 Ill. 26, 86 N. E. 601.

\$500. *Southern Ry. v. Johnson*, 101 S. W. 929, 31 Ky. L. Rep. 143.

\$500. *Baker v. Best*, 107 S. W. 1192, 33 Ky. L. Rep. 1.

\$500. *Campbell v. Dreher*, 110 S. W. 353, 33 Ky. L. Rep. 444.

\$500. *Louisville Ry. v. O'Connell*, 126 S. W. 1103 (Ky.).

\$500. *Creason v. St. Louis, I. M. & S. Ry.*, 149 Mo. App. 223, 130 S. W. 445.

\$500. *Norman v. Bellingham*, 46 Wash. 205, 89 Pac. 559.

\$600. *St. Louis & S. F. Ry. v. Neely*, 45 Tex. Civ. App. 611, 101 S. W. 481.

\$600. *Carroll v. Centralia Water Co.*, 5 Wash. 613, 32 Pac. 609.

\$650. *Scurlock v. Boone*, 142 Ia. 684, 121 N. W. 369.

\$665. *Hill v. Glenwood*, 124 Ia. 479, 100 N. W. 522.

\$700. *Harvey v. News Pub. Co.* (R. I.), 69 Atl. 69.

\$750. *St. Louis S. W. Ry. v. Jackson*, 91 Ark. 14, 124 S. W. 241.

\$750. *Lemoine v. Sullivan* (Ark.), 134 S. W. 946.

\$750. *Ryan v. Knickerbocker Steam-boat Co.*, 15 Daly, 520, 8 N. Y. Supp. 471.

\$800. *Winfrey v. St. Louis Trans. Co.*, 122 Mo. App. 388, 99 S. W. 458.

\$825. *Chesapeake & O. Ry. v. Dodge*, 66 S. W. 606, 23 Ky. L. Rep. 1959.

\$1,000. *Eagle Distillery v. Hardy* (Ky.), 120 S. W. 336.

\$1,000. *Boyle v. Saginaw*, 124 Mich. 348, 82 N. W. 1057.

\$1,000. *Hedges v. Metropolitan St. Ry.*, 125 Mo. App. 583, 102 S. W. 1086.

\$1,000. *Maness v. Joplin & P. Ry.*, 149 Mo. App. 259, 130 S. W. 87.

\$1,000. *Kelly v. Butte*, 34 Mont. 530, 87 Pac. 968.

\$1,000. *Rogers v. Mann* (R. I.), 70 Atl. 1057.

\$1,000. *Houston C. S. Ry. v. Ross* (Tex. Civ. App.), 28 S. W. 254.

\$1,200. *Rush v. Spokane F. & N. Ry.*, 23 Wash. 501, 63 Pac. 500.

\$1,200. *Hiroux v. Baum*, 137 Wis. 197, 118 N. W. 533, 19 L. R. A. (N. S.) 332.

\$1,250 (reduced from \$2,500).

<sup>154</sup> For a slight or temporary injury the following verdicts have been held excessive:

\$25,000; reduced to \$5,000. *Peyton v. Texas & P. Ry.*, 41 La. Ann. 801, 6 So. 690.

\$25,000; reduced to \$12,500. *Yazoo & M. V. R. R. v. Cobb*, 94 Miss. 561, 48 So. 522.

\$17,500. *Dresch v. Elliott*, 137 App. Div. 252, 122 N. Y. Supp. 14.

\$12,000. *Rueping v. Chicago & N.*

### § 1348. Broken bones—Bones of leg and hip.

For a broken leg the amount of compensation allowed by the

*Bauer v. Ollendorf*, 12 Ind. App. 397, 40 N. E. 544.

\$1,250. *Owensboro v. Williams* (Ky. L. Rep.), 116 S. W. 280.

\$1,250. *Connor v. Wabash R. R.*, 149 Mo. App. 675, 129 S. W. 777.

\$1,250. *Clegg v. Metropolitan St. Ry.*, 37 N. Y. Supp. 130.

\$1,250. *Ft. Worth & D. C. Ry. v. Bell*, 5 Tex. Civ. App. 28, 23 S. W. 922.

\$1,350. *Washington v. Rhode Island Co. (R. I.)*, 70 Atl. 913.

\$1,400. *Smith v. Des Moines*, 84 Ia. 685, 51 N. W. 77.

\$1,400. *Southern Ry. v. Cash*, 110 Va. 282, 65 S. E. 601.

\$1,500 (reduced from \$2,000). *Marshall v. Saginaw V. T. Co.*, 157 Mich. 541, 122 N. W. 131.

\$1,500. *Mack v. Chicago, R. I. & P. Ry.*, 123 Mo. App. 531, 101 S. W. 142.

\$1,600. *Driscoll v. Humes, Cruise & Smiley Co. (R. I.)*, 69 Atl. 766.

\$1,675. *Stevens v. E. & N. A. Ry.*, 66 Me. 74.

\$2,000. *Prowell v. Waterloo*, 144 Ia. 689, 123 N. W. 346.

\$2,000. *Plozke v. Detroit U. Ry.*, 162 Mich. 632, 127 N. W. 700.

\$2,000. *Kampmann v. Rothwell* (Tex. Civ. App.), 107 S. W. 120.

\$2,500. *A. L. Clark Lumber Co. v. Johns* (Ark.), 135 S. W. 892.

\$2,500. *Miller v. St. Paul City Ry. (Minn.)*, 68 N. W. 862.

\$2,500. *Heiberger v. Missouri & Kansas Tel. Co.*, 133 Mo. App. 452, 113 S. W. 730.

\$2,500. *Citizens' Ry. v. Griffin*, 49 Tex. Civ. App. 569, 109 S. W. 999.

\$2,500. *Chesapeake & O. Ry. v. Hoffman*, 109 Va. 414, 63 S. E. 432.

\$2,775. *Henderson v. Clayton*, 57 S. W. 1, 22 Ky. L. Rep. 283.

\$3,000. *La Doucre v. Nichel* (Minn.), 131 S. W. 852.

\$3,000. *Egan v. Dry Dock, E. B. & B. R. R.*, 42 N. Y. Supp. 188.

\$4,000. *Morris v. St. Paul City Ry.*, 105 Minn. 276, 117 N. W. 500.

\$6,926.06. *Phillips v. Taxi Service Co.*, 183 Fed. 869.

\$7,500. *Osterholm v. Boston & M. C. C. & S. M. Co.*, 40 Mont. 508, 107 Pac. 499.

*W. R. R.*, 116 Wis. 625, 93 N. W. 843.

\$10,000. *Duffy v. Jacobson*, 135 Ill. App. 472.

\$10,000. *Louisville & N. R. R. v. Brown*, 127 Ky. 732, 106 S. W. 795.

\$10,000. *Corcoran v. Ulster & D. R. R.*, 40 N. Y. Supp. 1117.

\$10,000; reduced to \$5,000. *Smith v. Third Ave. R. R.*, 10 App. Div. 409, 41 N. Y. Supp. 977.

\$10,000. *Becker v. Albany Ry.*, 54 N. Y. Supp. 395.

\$10,000; reduced to \$5,000. *Missouri Pacific Ry. v. Texas Pacific Ry.*, 41 Fed. 311.

\$6,500. *Landro v. Great N. Ry. (Minn.)*, 130 N. W. 553.

\$6,500. *Waddell v. Metropolitan St. Ry.*, 213 Mo. 8, 111 S. W. 542.

\$6,300. *Fremont E. & M. V. R. R. v. French*, 48 Neb. 638, 67 N. W. 472.

\$6,000. *Louisville & N. R. R. v. Survant*, 27 S. W. 999, 96 Ky. 197.

\$5,500. *Karasich v. Hasbrouch*, 28 Wis. 569.

\$5,500; reduced to \$3,500. *Wadleigh v. Duluth St. Ry.*, 92 Minn. 415, 100 N. W. 104.

\$5,000 (reduced from \$7,000). *Alabama G. S. R. R. v. Burgess*, 119 Ala. 555, 25 So. 251, 72 Am. St. Rep. 943.

\$5,000; reduced to \$3,500. *Moudy v. St. Louis D. B. & P. Co.*, 153 Mo. App. 34, 130 S. W. 476.

court has varied greatly.<sup>155</sup> Verdicts have also been considered

\$5,000; reduced to \$1,500. *Evers v. Weil*, 17 N. Y. Supp. 29.

\$5,000. *Spofford v. Rhode Island Suburban Ry.*, 29 R. I. 34, 69 Atl. 2.

\$4,500. *Illinois Cent. R. R. v. Downs*, 122 Ill. App. 545.

\$4,500. *Meade v. Brooklyn Heights R. R.*, 39 N. Y. Supp. 320.

\$4,300. *Levitt v. Nassau El. Co.*, 43 N. Y. Supp. 426.

\$3,500. *Southern Ry. v. Lee*, 119 S. W. 170 (Ky. L. Rep.).

\$3,500. *Shortsleeve v. New York C. & H. R. R.*, 40 N. Y. Supp. 1105.

\$3,000. *Graham v. Rockford*, 142 Ill. App. 306, affirmed, 238 Ill. 214, 87 N. E. 361.

\$3,000. *Lexington Ry. v. Woodward*, 106 S. W. 853, 32 Ky. L. Rep. 653.

\$3,000. *Kentucky & I. B. & R. Co. v. Singheiser*, 115 S. W. 192 (Ky. L. Rep.).

\$3,000. *Kennedy v. St. Paul City Ry.*, 59 Minn. 45, 60 N. W. 810.

\$3,000; reduced to \$1,925. *Putz v. St. Paul Gas Light Co.*, 108 Minn. 243, 121 N. W. 1109.

\$2,500. *Chicago, R. I. & P. R. R. v. Payzant*, 87 Ill. 125.

\$2,500. *Lake St. El. R. R. v. Johnson*, 70 Ill. App. 413.

\$2,500; reduced to \$2,000. *West Chicago St. R. R. v. Musa*, 80 Ill. App. 223.

\$2,500. *Haywood v. Dering Coal Co.*, 145 Ill. App. 506.

\$2,500. *Vournakis v. Maropulos*, 147 Ill. App. 630.

\$2,350. *Fremont E. & M. V. R. R. v. Leslie*, 41 Neb. 159, 59 N. W. 559.

\$2,250. *Haskins v. Rhode Island Co. (R. I.)*, 69 Atl. 335.

\$2,000; reduced to \$1,000. *St. Louis, I. M. & S. R. R. v. Stovall (Ark.)*, 136 S. W. 169.

\$1,500. *St. Louis, I. M. & S. R. R. v. Snell*, 82 Ark. 61, 100 S. W. 67.

\$1,500. *Dixon v. Scott*, 74 Ill. App. 277.

\$1,500; reduced to \$1,000. *Comrade v. Atlas L. & S. Co.*, 44 Wash. 470, 87 Pac. 517.

\$1,425; reduced to \$1,000. *Springfield Consol. Ry. v. Wright*, 134 Ill. App. 598.

\$1,000. *Parkinson Sugar Co. v. Riley*, 50 Kan. 401, 31 Pac. 1090.

\$1,000; reduced to \$500. *Yazoo & M. R. R. v. Kelly (Miss.)*, 53 So. 779.

\$1,000; reduced to \$600. *Johnson v. Ish (Neb.)*, 133 N. W. 201.

\$750; reduced to \$350. *Beller v. Levy*, 68 Misc. 182, 124 N. Y. Supp. 411.

\$700; reduced to \$400. *Durose v. St. Paul City Ry.*, 80 Minn. 512, 83 N. W. 397.

\$500. *Southern Ry. v. Turner (Miss.)*, 49 So. 113.

\$400. *Chicago v. Colman*, 33 Ill. App. 557.

\$250; reduced to \$100. *Catzer v. Brooklyn, O. C. & S. R. R. (Misc.)*, 112 N. Y. Supp. 1088.

\$250; reduced to \$125. *De Noyels v. Joline (Misc.)*, 116 N. Y. Supp. 662.

\$250. *Vilicki v. New York Transp. Co.*, 65 Misc. 43, 119 N. Y. Supp. 220.

<sup>155</sup> For a broken leg the following verdicts have been upheld:

\$275. *Madisonville v. Stewart (Ky.)*, 121 S. W. 421.

\$500, nervous system injured. *Kentucky Hotel Co. v. Camp*, 97 Ky. 424, 30 S. W. 1010.

\$900, seven months lame, leg permanently shortened. *Palmer Transf. Co. v. Smith*, 137 Ky. 319, 125 S. W. 725, 29 L. R. A. (N. S.) 321.

\$985 (reduced from \$1,000), both legs, permanent deformity. *Mitchell v. Libby*, 149 Ill. App. 201.

\$1,000. *Hobart Lee Tie Co. v. Keck*, 89 Ark. 122, 116 S. W. 183.

\$1,200. *Smith v. Heibel*, 157 Mo. App. 177, 137 S. W. 70.

for damages from broken ankles,<sup>156</sup> broken kneecap,<sup>157</sup> and broken hips.<sup>158</sup>

\$1,400. *Smith v. Des Moines*, 84 Ia. 685, 51 N. W. 77.

\$1,500, permanent distortion and pain. *Morgan v. C. Hager & Sons' H. M. Co.*, 120 Mo. App. 590, 97 S. W. 638.

\$1,800, permanent shortening. *Propson v. Leatham*, 80 Wis. 608, 50 N. W. 586.

\$2,000. *Pearce v. Kansas City*, 156 Mo. App. 230, 137 S. W. 629.

\$2,500, permanent incapacity. *Dries*

*v. Frederick*, 73 Tex. 460, 11 S. W. 493.

\$2,500. *Patterson v. Melchior*, 106 Minn. 437, 119 N. W. 402.

\$3,000 (reduced from \$4,000). *Chicago City Ry. v. Kenyon*, 137 Ill. App. 126, affirmed, 235 Ill. 406, 85 N. E. 660.

\$3,000; arm also broken and deformed, serious nervous effects. *Maine v. Chicago City Ry.*, 148 Ill. App. 509.

\$3,000, permanent injury, incapacity

<sup>156</sup> For a broken ankle the following verdicts have been upheld:

\$2,500. *Miller v. City of New York*, 104 App. Div. 33, 93 N. Y. Supp. 227.

\$3,000, arm also broken, earning capacity impaired. *Selma Street & S. R. R. v. Owen*, 132 Ala. 420, 31 So. 598.

\$3,000, permanent lameness. *St. Joseph & G. I. R. R. v. Hedge*, 44 Neb. 446, 62 N. W. 887.

\$3,000, Pott's fracture. *Haney v. City of New York*, 126 App. Div. 908, 110 N. Y. Supp. 815.

\$3,000, permanent stiffness. *St. Joseph & G. I. R. R. v. Hedge*, 44 Neb. 446, 62 N. W. 887.

\$4,000, painful and permanent injuries. *Missouri, K. & T. Ry. v. Briscoe* (Tex. Civ. App.), 109 S. W. 453.

\$4,000, crippled for life. *St. Louis & S. F. Ry. v. Woolum*, 84 Tex. 570, 19 S. W. 782.

\$5,000, permanent impairment of earning capacity. *Louisville v. Arrowsmith* (Ky.), 140 S. W. 1029.

\$6,500, rupture, permanent incapacity. *The Mineola*, 44 Fed. 143.

\$7,500, Pott's fracture. *Ft. Worth v. Williams* (Tex. Civ. App.), 119 S. W. 137.

The following verdicts have been held excessive:

\$10,000. *Adams v. Mo. Pac. Ry.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509.

\$8,666, strength of leg permanently impaired, but not use of it; reduced to \$5,000. *Nicholds v. Crystal Plate Glass Co.*, 126 Mo. 55, 28 S. W. 991.

\$4,000; great pain, permanent lameness; reduced to \$2,500. *Johnson v. St. Paul City Ry.*, 67 Minn. 260, 69 N. W. 900, 36 L. R. A. 586.

<sup>157</sup> For broken kneecap and dislocated collar bone, \$3,000 was allowed. *Ward v. Meeds* (Minn.), 130 N. W. 2.

<sup>158</sup> For a broken hip the following verdicts have been upheld:

\$2,000, leg permanently shortened and crippled. *Leonard v. Union Ry.*, 98 App. Div. 204, 90 N. Y. Supp. 574.

\$3,000. *Beringer v. Dubuque St. R. R.*, 118 Iowa, 135, 91 N. W. 931.

\$5,000, impacted fracture, permanent injury. *Kansas City v. Manning*, 50 Kan. 373, 31 Pac. 1104.

\$5,000, impacted fracture, great pain. *Peterson v. Metropolitan St. Ry.*, 211 Mo. 498, 111 S. W. 37.

\$7,750, permanent lameness. *Setzler v. Metropolitan St. Ry. (Mo.)*, 127 S. W. 1.

The following verdicts were held excessive:

\$15,000; reduced to \$10,000. *Coxhead v. Johnson*, 47 N. Y. Supp. 389.

\$12,500; reduced to \$7,000. *Dean v. Wabash R. R.*, 229 Mo. 425, 129 S. W. 953.

### § 1349. Bones of arm or shoulder.

In case of a broken arm, verdicts have had a rather wide

to labor for a year. *Campbell v. Railway Transfer Co.*, 95 Minn. 375, 104 N. W. 547.

\$3,000, leg shortened. *Weingarten v. Metropolitan St. Ry.*, 62 App. Div. 364, 70 N. Y. Supp. 1113.

\$3,000, leg shortened. *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046.

\$3,250, permanent lameness, severe pain. *Navailles v. Dielmann*, 124 La. 421, 50 So. 449.

\$3,850, permanent lameness, shoulder dislocated. *North Arkansas Tel. Co. v. Steiner*, 95 Ark. 275, 129 S. W. 810.

\$4,000, permanent shortening. *Roche v. Redington*, 125 Cal. 174, 57 Pac. 890.

\$4,000, both legs broken. *Atchison, T. & S. F. Ry. v. Hastings*, 78 Kan. 499, 100 Pac. 68.

\$4,000. *Danville, L. & N. Turnpike Road Co. v. Stewart*, 2 Metc. (Ky.) 119.

\$4,000, foot crushed, head wound, long disablement. *Burleigh v. St. Louis Tr. Co.*, 124 Mo. App. 724, 102 S. W. 621.

\$4,000, left arm and leg permanently injured, shock to nervous system, large medical expenses. *Missouri, K. & T. Ry. v. Malone* (Tex. Civ. App.), 110 S. W. 958.

\$4,316.75, wrist sprained, ankle bruised, leg shortened. *Chicago & A. Ry. v. Watsker*, 128 Ill. App. 299.

\$4,500 (reduced from \$6,000), permanent shortening, lameness and incapacity. *Lehman v. Minneapolis & S. L. R. R.* (Ia.), 133 N. W. 327.

\$4,500, both legs, one permanently shortened, loss of time and expenses \$1,143. *Burke v. St. Louis Southwestern Ry.*, 120 Mo. App. 683, 97 S. W. 981.

\$4,500, permanent incapacity. *Evers v. Wiggins Ferry Co.*, 127 Mo. App. 236, 105 S. W. 306.

\$5,000 (reduced from \$8,000), per-

manent crippling. *Chicago City Ry. v. Mumford*, 97 Ill. 560.

\$5,000, permanent shortening. *Eilerman v. Farmer* (Ky. L. Rep.), 118 S. W. 289.

\$5,000, permanent incapacity. *Perrette v. City of Kansas City*, 162 Mo. 238, 62 S. W. 448.

\$5,000, permanent incapacity. *Pauck v. St. Louis D. B. & P. Co.*, 166 Mo. 639, 66 S. W. 1070.

\$5,000, permanent injury and deformity. *Garard v. Manufacturers' C. & C. Co.*, 207 Mo. 242, 105 S. W. 767.

\$5,000, permanent lameness. *Baker v. Metropolitan St. Ry.* (Mo. App.), 126 S. W. 764.

\$5,000, permanent lameness and deformity. *Missouri, K. & T. Ry. v. Johnson* (Tex. Civ. App.), 37 S. W. 771.

\$5,000, broken arm also. *Hoseth v. Preston Mill Co.*, 55 Wash. 416, 104 Pac. 612.

\$5,500, compound comminuted fracture, permanent injury and lameness. *Kincaid v. Walla Walla V. T. Co.*, 57 Wash. 334, 106 Pac. 918.

\$6,000, necrosis of bone, permanent disability. *Louisiana & Ark. Ry. v. Nix*, 94 Ark. 270, 126 S. W. 1076.

\$7,000, permanent shortening and lameness, constitution impaired. *Moore v. Wabash R. R.*, 157 Mo. App. 53, 137 S. W. 5.

\$7,000, leg shortened, permanent pain. *Fitch v. Broadway & S. A. R. R.*, 58 N. Y. Super. Ct. 575, 10 N. Y. Supp. 225.

\$7,500, necrosis of bone, several operations, chronic invalid for life. *Chicago v. Loebel*, 130 Ill. App. 487, affirmed, 228 Ill. 52, 81 N. E. 796.

\$7,595, other injuries, permanent nervousness, leg shortened. *Loftus v. Metropolitan St. Ry.*, 220 Mo. 470, 119 S. W. 942.

\$7,700, hip crushed, ribs broken, per-



range, as might be expected from the great variety of ac-

manent disability. *Foster v. B. I. Crooker Co.*, 143 App. Div. 920, 126 N. Y. Supp. 1020.

\$8,500, several ribs broken, lung injured, great pain, permanently crippled. *Foster v. Chicago, R. I. & P. Ry.*, 134 Ia. 67, 111 N. W. 415.

\$9,000, leg shortened and crippled. *Griffith v. Missouri Pac. R. R.*, 98 Mo. 168, 11 S. W. 559.

\$10,000, permanent cripple, great pain. *Hilton & D. L. Co. v. Ingram*, 136 Ga. 473, 70 S. E. 234.

\$10,000, compound fracture, shock to nervous system, permanent impairment of capacity. *Olson v. Nebraska Tel. Co.*, 85 Neb. 331, 127 N. W. 916.

\$10,000, arm dislocated, shoulder and side injured, long continued incapacity. *Brown v. Sullivan*, 71 Tex. 470, 10 S. W. 288.

\$10,000, bone would not knit, plaintiff could not stand. *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369.

\$12,500, comminuted fracture both legs, compound fracture of jaw. *McDonnell v. Henry Elias Brewing Co.*, 44 N. Y. Supp. 652.

\$15,000, compound fracture, intense pain for twenty months, \$2,300 medical expenses. *Western U. T. Co. v. Engler*, 75 Fed. 102, 21 C. C. A. 246.

\$15,000, leg shortened, surgical operation. *Mitchell v. Broadway & S. A. Ry.*, 70 Hun, 387, 24 N. Y. Supp. 32.

\$20,000, both legs, permanent disability, excruciating pain. *St. Louis S. W. Ry. v. Ford* (Tex. Civ. App.), 121 S. W. 709.

\$22,000, both legs, ribs and back, paralyzed from waist down, use of all lower organs lost, total disability. *Louisville & N. R. R. v. Melton*, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618.

The following verdicts were held to be excessive:

\$49,000, both legs and right arm broken, shoulder and head hurt, incurable wound, leg shortened; reduced to \$25,000. *Canfield v. Chicago, R. I. & P. Ry.*, 142 Ia. 658, 121 N. W. 186.

\$15,000, compound fracture, several operations, great pain, crippled for life; reduced to \$7,500. *Dole v. New Orleans R. & L. Co.*, 121 La. 945, 46 So. 929, 19 L. R. A. (N. S.) 623.

\$14,833. *Southwestern R. R. v. Singleton*, 66 Ga. 252.

\$12,500, several months' loss of time, use of leg somewhat impaired; reduced to \$7,000. *Dean v. Wabash R. R.*, 229 Mo. 425, 129 S. W. 953.

\$12,000; reduced to \$2,500. *Rueping v. Chicago & N. W. Ry.*, 116 Wis. 625, 93 N. W. 843, 96 Am. St. Rep. 1013.

\$11,000, leg shortened; reduced to \$8,000. *Rice v. Reece* (Tex. Civ. App.), 110 S. W. 502.

\$11,000. *Bronson v. Forty-Second St. M. & St. M. A. Ry.*, 67 Hun, 649, 21 N. Y. Supp. 695.

\$10,000, both legs, one permanently weakened; reduced to \$3,500. *Moore v. W. R. Pickering Lumber Co.*, 105 La. 504, 29 So. 990.

\$9,000 (reduced from \$15,000); reduced to \$5,266.20. *Ross v. Metropolitan St. Ry.*, 116 App. Div. 507, 101 N. Y. Supp. 932.

\$6,000; reduced to \$4,000. *Clapp v. Hudson River R. R.*, 19 Barb. 461.

\$5,000, both legs broken; reduced to \$3,500. *Hart v. Cascade Timber Co.*, 39 Wash. 279, 81 Pac. 738.

\$5,000. *North Chicago St. R. R. v. Wiswell*, 68 Ill. App. 443.

\$5,000. *Ross v. Metropolitan St. Ry.*, 104 App. Div. 378, 93 N. Y. Supp. 679.

\$4,100, slight limp; reduced to \$2,100. *Slette v. Great Northern Ry.*, 53 Minn. 341, 55 N. W. 137.

companying injuries.<sup>159</sup> Verdicts have also been considered for

\$4,000. *Lombard v. Chicago*, R. I. & P. R. R., 47 Ia. 494.

\$4,000, severe sprain of ankle, injuries to some extent permanent; reduced to \$2,000. *Galveston Electric Co. v. Diekey* (Tex. Civ. App.), 138 S. W. 1093.

\$3,000. *Chicago v. Sutton*, 136 Ill. App. 221.

\$3,000; reduced to \$2,000: *South Omaha v. Fennell* (Neb.), 94 N. W. 632.

\$2,800, slight permanent limp; former verdict of \$1,700 set aside; could not sanction more. *Collins v. Janesville*, 107 Wis. 436, 87 N. W. 241.

\$1,700 (reduced from \$2,500). *Collins v. Janesville*, 107 Wis. 436, 83 N. W. 695.

\$1,500. *Johnson v. Heath* (Neb.), 98 N. W. 832.

<sup>159</sup> For a broken arm the following verdicts have been upheld:

\$500, permanent deformity. *Gerken v. Plimpton*, 62 App. Div. 35, 70 N. Y. Supp. 793.

\$625, compound fracture, front teeth knocked out. *D. H. Ewing & Sons v. Callahan*, 105 S. W. 387, 32 Ky. L. Rep. 46.

\$850, dislocated hip, long-continued pain. *Southern Ry. v. Burgess*, 143 Ala. 364, 42 So. 35.

\$1,750, compound fracture, permanent impairment of use of arm, large medical expenses. *Trask v. Hallowell Granite Wks.*, 106 Me. 458, 76 Atl. 919.

\$2,600, face bruised, knee hurt, hearing permanently injured. *Louisville & N. R. R. v. Roe*, 142 Ky. 456, 134 S. W. 437.

\$3,000, pain, loss of time, loss of use of three fingers. *Mallay v. Kelly-Atkinson Const. Co.*, 144 Ill. App. 226, affirmed, 240 Ill. 102, 88 N. E. 234.

\$3,000, pain, partial loss of use of hand. *Lancón v. Morgan's L. & T.*

*R. R. & S. S. Co.*, 127 La. 1, 53 So. 365.

\$3,000, spine and shoulder injured, ribs wrenched, injuries permanent. *Texas Midland R. R. v. Byrd* (Tex. Civ. App.), 110 S. W. 199.

\$4,500, permanent reduction of working capacity. *Sweeney v. Butte*, 15 Mont. 274, 39 Pac. 286.

\$4,750, permanent loss of use, several operations. *Clark v. Johnson County Telephone Co. (Ia.)*, 123 N. W. 327.

\$5,000, ear torn from head, face disfigured, long suffering, subject to spasms. *Wankowski v. Crivitz P. & P. Co.*, 137 Wis. 123, 118 N. W. 643.

\$8,000, ribs broken, head, hip, back and legs wounded. *Chicago, R. I. & P. Ry. v. Pratt*, 94 Ark. 430, 127 S. W. 711.

\$10,000, ribs broken, hand, arm and leg cut, back wrenched, great pain. *Yazoo & M. V. R. R. v. Grant*, 86 Miss. 585, 38 So. 502.

\$15,000, collar bone broken, arm shortened, plaintiff, a surgeon, rendered unable to do delicate operations, nervous system disturbed, great pain. *Galveston, H. & S. A. Ry. v. Young*, 45 Tex. Civ. App. 430, 100 S. W. 993.

\$15,000, collar bone broken, chest compressed, elbow crushed. *Gulf, C. & S. F. Ry. v. Dorsey* (Tex.), 18 S. W. 444.

\$25,000, five ribs broken, unable to use arm one year, money loss to trial \$9,000. *Dieffenbach v. New York, L. E. & W. R. R.*, 5 App. Div. 91, 38 N. Y. Supp. 788.

The following verdicts were held excessive:

\$11,800, stiffness of two fingers; reduced to \$6,000. *Clifton v. Kansas City So. Ry. (Mo.)*, 135 S. W. 40.

\$1,500; reduced to \$500. *Diblin v. Murphy*, 3 Sandf. 19.

broken bones in the hand,<sup>160</sup> finger,<sup>161</sup> wrist<sup>162</sup> and shoulder.<sup>163</sup>

### § 1350. Bones of the trunk.

For fracture of the spine large damages have been given and allowed.<sup>164</sup> For a broken rib or ribs<sup>165</sup> the amount recovered varies according to the accompanying injuries or other cir-

<sup>160</sup> For broken bones in a hand the following verdicts have been upheld:

\$700. *Townsend v. Joplin* (Mo. App.), 123 S. W. 474.

\$1,500, hand permanently stiffened. *Goodloe v. Metropolitan St. Ry.*, 120 Mo. App. 194, 96 S. W. 482.

<sup>161</sup> For a broken finger the following verdicts have been upheld:

\$300, hand lacerated, disability for three months. *Olsen v. Wendt*, 58 Misc. 21, 110 N. Y. Supp. 153.

\$2,500, hand permanently injured. *Gregory v. Slaughter*, 99 S. W. 247, 30 Ky. Law Rep. 500.

<sup>162</sup> For a broken wrist the following verdicts have been upheld:

\$600 (though reduced by trial court to \$150). *Plaunt v. Railway Transfer Co.*, 90 Minn. 499, 97 N. W. 433.

\$1,250, hand crippled. *Mohr v. Wetherill*, 33 Misc. 791, 67 N. Y. Supp. 590.

\$2,000, Colles fracture, permanent diminution earning capacity. *Powers v. Maravia*, 125 App. Div. 902, 108 N. Y. Supp. 159.

\$2,500, Colles fracture, hand disfigured and use permanently impaired. *Schreiber v. Depew*, 137 App. Div. 433, 121 N. Y. Supp. 757.

<sup>163</sup> For a broken shoulder, with permanent impairment of use of arm, a verdict for \$8,000 was held excessive. *Southern Ry. v. Goddard*, 97 S. W. 392, 30 Ky. L. Rep. 126.

<sup>164</sup> For fracture of the spine the following verdicts have been upheld:

\$1,000. *Springfield Consol. Ry. v. Johnson*, 134 Ill. App. 536.

\$4,000, sprained ankle, nervous sys-

tem affected. *The City of Portsmouth*, 125 Fed. 264.

\$4,500, progressive disability for life. *Hamburg-Amer. S. Co. v. Baker*, 185 Fed. 40, 107 C. C. A. 290.

\$18,000, broken neck. *Missouri, K. & T. Ry. v. Thomas*, 48 Tex. Civ. App. 646, 107 S. W. 868.

\$25,000, broken neck, total disability. *Texas & N. O. R. R. v. Barwick*, 50 Tex. Civ. App. 544, 110 S. W. 953.

In *Gordon v. Kansas City Southern Ry.*, 222 Mo. 516, 121 S. W. 80, where the plaintiff's back and five ribs were broken, his pelvis and hip bones mashed, and the injuries resulted in total paralysis from the middle of the back down, and he had no control over the functions of that part of his body, a verdict of \$35,000 was held excessive, and reduced to \$25,000.

<sup>165</sup> For fracture of one or more ribs the following verdicts have been upheld:

\$500 (reduced from \$600), several ribs broken, two attacks of pleurisy. *Chicago U. T. Co. v. Berkes*, 136 Ill. App. 105.

\$988, three ribs broken, shoulder dislocated, internal injuries. *Beverage v. Rockport*, 106 Me. 223, 76 Atl. 677.

\$1,000, health impaired, pain. *Merchants' I. & C. S. Co. v. Bargholt*, 129 Ky. 60, 110 S. W. 364.

\$1,000, year's disability. *Dahmer v. Metropolitan St. Ry.*, 136 Mo. App. 443, 118 S. W. 496.

\$1,000, probably permanent injuries. *McDermott v. Chicago & N. W. Ry.*, 85 Wis. 102, 55 N. W. 179.

cumstances. Damages allowed for fracture of the collar bone have also been examined.<sup>166</sup>

### § 1351. Bones of the head.

Verdicts have been examined by the courts which were rendered for a broken jaw,<sup>167</sup> or nose,<sup>168</sup> or for fracture of the skull.<sup>169</sup>

\$1,025. *Ashley v. Aberdeen*, 46 Wash. 385, 90 Pac. 210.

\$1,400, shoulder dislocated, permanent injury. *Waukegan v. Sharafinski*, 135 Ill. App. 436.

\$1,500, ribs and foot. *West Chicago St. Ry. v. Mileham*, 138 Ill. App. 569.

\$2,000, sprained ankle, nervous system shocked, lame for three months. *Lee v. St. Louis & S. F. R. R.*, 146 Mo. App. 696, 129 S. W. 773.

\$2,200, bruised back and side, wrenched spine, nervous disorders. *Missouri, K. & T. Ry. v. Hay* (Tex. Civ. App.), 86 S. W. 954.

\$3,000, collar bone broken, great suffering. *Louisville & S. I. T. Co. v. Snead*, 93 Ill. App. 177.

\$3,200, tumor, pleurisy, adhesion of lung. *Wynne v. Atlantic Ave. R. R.*, 14 Misc. 394, 35 N. Y. Supp. 1034.

\$3,500, stomach trouble, permanent impairment of use of arms. *Craney v. Schloeman*, 145 Ill. App. 313.

\$3,750, side bruised, insensible for some time. *Missouri Pacific Ry. v. Aiken*, 71 Tex. 373, 9 S. W. 437.

\$4,500, contusion of shoulder and head, inability to work, deterioration in health. *Ivey v. Brooklyn Heights R. R.*, 63 App. Div. 311, 71 N. Y. Supp. 633.

\$4,500, permanent injury affecting respiration. *Perry v. Metropolitan St. Ry.*, 68 App. Div. 351, 74 N. Y. Supp. 1.

\$5,000, pain and disability. *Texas & N. O. R. R. v. Reed*, 54 Tex. Civ. App. 26, 116 S. W. 69.

\$8,250, several ribs, lung punctured. *Reed v. Chicago, St. P., M. & O. Ry.*, 74 Ia. 188, 37 N. W. 149.

\$9,000, use of right arm lost. *Burke v. City & County Contract Co.*, 133 App. Div. 113, 117 N. Y. Supp. 400.

\$9,000, badly scalded, unable to work. *Galveston, H. & S. A. Ry. v. Croskell*, 6 Tex. Civ. App. 160, 25 S. W. 486.

The following verdicts have been held excessive:

\$38,750, collar bone fractured, circulation impaired, chest deformed. *Tunnel M. & L. Co. v. Cooper*, 50 Colo. 390, 115 Pac. 901.

\$5,000; reduced to \$2,500. *Mariott v. Missouri Pac. Ry.*, 142 Mo. App. 199, 204, 126 S. W. 231.

\$5,000; reduced to \$3,500. *Fry v. Great Northern Ry.*, 95 Minn. 87, 103 N. W. 733.

<sup>166</sup> For fracture of the collar bone the following verdicts have been upheld:

\$2,500, permanent injury to arm and hand. *Clarke v. Philadelphia & R. C. & I. Co.*, 92 Minn. 418, 100 N. W. 231.

\$2,500. *Chicago, R. I. & P. Ry. v. Barrett*, 35 Tex. Civ. App. 366, 80 S. W. 660.

<sup>167</sup> For a broken jaw the following verdicts have been upheld:

\$4,000, with loss of ear. *Well v. Moran Bros. Co.*, 55 Wash. 102, 104 Pac. 172.

\$6,000, permanent disfigurement. *Miller v. Erie R. R.*, 54 N. Y. Supp. 606.

<sup>168</sup> For a broken nose, and loss of teeth \$330 was not excessive. *Texas & P. Ry. v. Crockett*, 27 Tex. Civ. App. 463, 66 S. W. 114.

<sup>169</sup> For a broken skull the following verdicts have been upheld:

\$1,500 (reduced from \$3,000), mental

### § 1352 Surgical operation.

Where the injury results in a serious abdominal or other major operation, the damages will be swelled by the risk, pain, and expense of the operation; and heavy damages may be given and allowed by the court.<sup>170</sup>

### § 1353. Pain and suffering.

In many cases the chief element of damages is the pain and suffering, physical and mental, of the plaintiff. Where that is the case, it is of course difficult to place any check on the discretion of the jury; and the circumstances necessarily vary so much, and pain may be felt in such infinite difference of degree, that verdicts for very different amounts will be allowed.<sup>171</sup> In a few cases the court is required to pass upon

disturbance and inability to work. *Savage v. Chicago & J. Ry.*, 142 Ill. App. 342, affirmed, 238 Ill. 392, 87 N. E. 377.

\$3,000, some disturbance of the brain. *Enos Fire Escape Co. v. Lanagan*, 136 Ill. App. 631, affirmed, *Lanagan v. Enos Fire Escape Co.*, 233 Ill. 308, 84 N. E. 267.

\$7,500, several pieces of bone and portion of brain removed, injuries permanent. *Phelps v. Conqueror Z. & L. Co.*, 218 Mo. 572, 117 S. W. 705.

<sup>170</sup> For an injury which caused a serious surgical operation the following verdicts have been upheld:

\$1,100. *Williams v. Shaw* (R. I.), 71 Atl. 207.

\$1,900. *Jarvis v. Metropolitan St. Ry.*, 65 App. Div. 490, 72 N. Y. Supp. 829.

\$1,999, permanent impairment earning capacity. *Illinois Cent. R. R. v. Mayes*, 142 Ky. 382, 134 S. W. 436.

\$3,000, permanent lameness. *Keane v. Seattle*, 55 Wash. 622, 104 Pac. 819.

\$3,000, impairment of health and function. *Allen v. Voje*, 114 Wis. 1, 89 N. W. 924.

\$3,725, injury to health. *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

\$4,156. *O'Malley v. Rhode Island Co. (R. I.)*, 70 Atl. 915.

\$5,000, great pain. *Niendorff v. Manhattan Ry.*, 38 N. Y. Supp. 690.

\$5,000, weakness in back, abscess in side. *Galveston H. & S. A. Ry. v. Sanders* (Tex. Civ. App.), 65 S. W. 889.

\$6,500, heavy expense, great pain. *Clarke v. Westcott*, 2 App. Div. 503, 37 N. Y. Supp. 1111.

\$9,000. *Alkire v. Myers Lumber Co. (Wash.)*, 106 Pac. 915.

\$10,933. *Van Vranken v. Kansas City E. Ry.*, 84 Kan. 287, 114 Pac. 202.

The following verdicts have been held excessive:

\$7,500; reduced to \$4,000. *Kirby v. St. Louis & S. F. R. R.*, 146 Mo. App. 304, 130 S. W. 69.

\$4,500; reduced to \$2,500. *Reems v. New Orleans G. N. R. R.*, 126 La. 511, 52 So. 681.

\$3,500; reduced to \$2,500. *Nelson v. Bromley*, 55 Wash. 256, 104 Pac. 251.

<sup>171</sup> Where pain and suffering, mental or physical, was a principal item of recovery the following verdicts have been upheld:

\$300. *Augusta v. Tharpe* (Ga.), 38 S. E. 389.

\$300. *Mordente v. New York Cab Co.*, 109 N. Y. Supp. 12.

the proper compensation for the conscious suffering before

\$300. *Levin v. Nassau Electric R. R.* (App. Div.), 122 N. Y. Supp. 863.

\$400. *Weiskopf v. Ritter*, 97 S. W. 1120, 29 Ky. L. Rep. 1268.

\$450. *Barker v. Jefferson*, 155 Mo. App. 390, 137 S. W. 10.

\$500. *Wallace v. Bach*, 97 S. W. 418, 30 Ky. L. Rep. 69.

\$500. *Cartwright v. Puissigur*, 125 La. 700, 51 So. 692.

\$500. *Thompson v. Poplar Bluff*, 124 Mo. App. 439, 101 S. W. 709.

\$500. *Piering v. Dunham Mfg. Co.*, 113 N. Y. Supp. 713.

\$700. *Illinois Central Ry. v. Smith*, 132 Ky. 732, 118 S. W. 933.

\$700. *Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326.

\$1,000. *Ozan Lumber Co. v. Bryan*, 90 Ark. 223, 119 S. W. 73.

\$1,000. *Lexington Ry. v. Johnson*, 139 Ky. 323, 122 S. W. 830.

\$1,000. *Joseph v. Edison Electric Co.*, 104 La. 634, 29 So. 223.

\$1,000. *Winkler v. St. Louis, I. M. & S. Ry.*, 21 Mo. App. 99.

\$1,054. *Smith v. Nassau Electric R. R.*, 57 App. Div. 152, 67 N. Y. Supp. 1044.

\$1,125. *Texas Cent. R. R. v. Wheeler* (Tex. Civ. App.), 116 S. W. 83.

\$1,400. *Radjaviller v. Third Ave. R. R.*, 58 App. Div. 11, 68 N. Y. Supp. 617.

\$1,500. *O'Shaugannessy v. Chicago City Ry.*, 144 Ill. App. 174.

\$1,500 (\$1,000 for permanent injuries, \$500 for pain). *Atchison, T. & S. F. R. R. v. Lee*, 8 Kan. App. 24, 54 Pac. 4.

\$1,500. *Curvin v. Grimes*, 132 Ky. 555, 116 S. W. 725.

\$1,500. *St. Louis Southwestern Ry. v. Browning*, 54 Tex. Civ. App. 521, 118 S. W. 245.

\$1,500. *Texarkana & Ft. S. Ry. v. Brandon* (Tex. Civ. App.), 126 S. W. 703.

\$2,000. *Atchison, T. & S. F. R. R. v. Stewart*, 55 Kan. 667, 41 Pac. 961.

\$2,000. *Austin v. St. Louis & S. F. R. R.*, 149 Mo. App. 397, 130 S. W. 385.

\$2,000. *Texas & P. R. R. v. Lowry*, 61 Tex. 149.

\$2,000. *Murray v. Seattle Electric Co.*, 50 Wash. 444, 97 Pac. 458.

\$2,250. *Louisville & E. R. R. v. Vincent*, 96 S. W. 898, 29 Ky. L. Rep. 1049.

\$2,500. *St. Louis, I. M. & S. Ry. v. Hartung*, 95 Ark. 220, 128 S. W. 1025.

\$2,500. *San Antonio Gas Co. v. Singleton* (Tex. Civ. App.), 59 S. W. 920.

\$2,810 (reduced from \$4,000). *Evans v. Iowa City*, 125 Ia. 202, 100 N. W. 1112.

\$3,000. *Montgomery v. Shirley*, 159 Ala. 239, 48 So. 679.

\$3,258. *Spires v. Middlesex & M. E. L. H. & P. Co.*, 70 N. J. L. 355, 57 Atl. 424.

\$4,000. *Houston & T. C. R. R. v. Bulger*, 35 Tex. Civ. App. 478, 80 S. W. 557.

\$4,000. *Galveston, H. & S. A. Ry. v. Matzdorf* (Tex. Civ. App.), 107 S. W. 882.

\$5,000. *Hanlon v. Missouri Pac. Ry.*, 104 Mo. 381, 16 S. W. 233.

\$5,333. *Lipsky v. C. Reiss Coal Co.*, 136 Wis. 307, 117 N. W. 803.

\$6,300. *St. Louis & S. F. R. R. v. Richards*, 23 Okla. 256, 102 Pac. 92.

\$7,000. *Allen v. Ames College Co.*, 106 Ia. 602, 76 N. W. 848.

\$7,500. *Hallack v. Johnson*, 12 Colo. 244, 20 Pac. 700.

\$8,000. *Southern Ry. v. Brewer*, 117 S. W. 958 (Ky.).

\$22,895. *Carr v. Am. Locomotive Co.*, 29 R. I. 276, 77 Atl. 104.

The following verdicts were held excessive:

death of a person who died as a result of the defendant's wrong.<sup>172</sup>

### § 1354. Permanent injuries—Disability to labor.

The injury caused by permanent impairment or destruction of ability to labor varies greatly, according to the capacity of the injured person and the nature and completeness of the impairment. Verdicts varying from small to very large have been considered by the courts.<sup>173</sup>

\$5,000 (reduced from \$7,500); reduced to \$2,500. *Hemenway v. Washington W. P. Co.*, 49 Wash. 338, 95 Pac. 269.

\$3,000; reduced to \$1,500. *Ferringer v. Crowley, O. & M. Co.*, 122 La. 441, 47 So. 763.

\$3,000; reduced to \$2,000. *Feddeck v. St. Louis Car Co.*, 125 Mo. App. 24, 102 S. W. 675.

\$2,700; reduced to \$1,700. *Meyers v. Syndicate H. & P. Co.*, 47 Wash. 48, 91 Pac. 549.

\$666.66 (reduced from \$1,000); reduced to \$300. *Puls v. Powelson*, 142 Ia. 604, 121 N. W. 1.

<sup>172</sup> The following verdicts for pain and suffering before death were upheld:

\$1,000, thirty or forty minutes. *St. Louis, I. M. & S. Ry. v. Pate*, 90 Ark. 135, 118 S. W. 260.

\$2,500, twenty-four hours. *St. Louis, I. M. & S. Ry. v. Robbins*, 57 Ark. 377, 21 S. W. 886.

\$6,750, excruciating pain for six days. *Bowling G. G. Co. v. Dean*, 141 Ky. 473, 134 S. W. 1115.

The following verdicts were held excessive:

\$4,000 where the deceased lived only a few moments after the accident. *St. Louis, I. M. & S. R. R. v. Dawson*, 68 Ark. 1, 56 S. W. 46.

\$3,500, suffering in the water before drowning; reduced to \$350. *The Robert Graham Dun*, 70 Fed. 270, 17 C. C. A. 90.

<sup>173</sup> For an injury causing partial or

total disability to labor the following verdicts have been upheld:

\$941.70, total permanent disability. *Montague v. Hanson*, 38 Mont. 376, 99 Pac. 1063.

\$1,000. *Osborn v. Jenkinson*, 100 Ia. 432, 69 N. W. 548.

\$1,000. *Lewis v. Wabash R. R.*, 142 Mo. App. 585, 121 S. W. 1090.

\$1,000, permanent incapacity. *Soderman v. Troy Steel & Iron Co.*, 70 Hun, 449, 24 N. Y. Supp. 401.

\$1,200, total disability probably permanent. *Hiroux v. Baum*, 137 Wis. 179, 19 L. R. A. (N. S.) 332, 118 N. W. 533.

\$1,250, total disability, permanent without dangerous operation. *Louisville Ry. v. Pulliam*, 101 S. W. 295, 30 Ky. L. Rep. 1325.

\$1,350, serious impairment of power to labor. *Oklahoma City v. Welsh (Okla.)*, 41 Pac. 598.

\$2,000. *Colorado City v. Smith*, 17 Colo. App. 172, 67 Pac. 909.

\$2,000, permanent disability. *Slezak v. St. Louis Transit Co.*, 142 Mo. App. 693, 121 S. W. 1095.

\$2,000, permanent total disability. *Felsch v. Babb*, 72 Neb. 736, 101 N. W. 1011.

\$2,000, permanent injuries. *Shawnee v. Slankard (Okla.)*, 116 Pac. 803.

\$2,232, permanent diminution of earning power. *Miller v. Manhattan Ry.*, 73 Hun, 512, 26 N. Y. Supp. 162.

\$2,250, permanent impairment of earning power, exemplary damages.

### § 1355. Permanent crippling.

Where the injury left the plaintiff a permanent cripple, large

*Louisville Ry. v. Gaddie*, 105 S. W. 454, 32 Ky. L. Rep. 316.

\$2,500, permanent disability. *Fuhry v. Chicago City Ry.*, 144 Ill. App. 521, affirmed, 239 Ill. 548, 88 N. E. 221.

\$2,500, paralysis, permanent disability. *Doherty v. Des Moines City Ry.*, 144 Ia. 26, 121 N. W. 690.

\$2,500, permanent disability. *Kansas City C. S. & R. Co. v. Taylor* (Tex. Civ. App.), 107 S. W. 889.

\$2,700, permanent impairment of ability to labor. *Louisville & N. R. R. v. Freppon*, 134 Ky. 650, 121 S. W. 454.

\$3,000, permanent injury. *Chicago v. Wieland*, 139 Ill. App. 197.

\$3,000, permanent diminution of earning capacity. *Conrad v. Springfield Consol. Ry.*, 145 Ill. App. 564, affirmed, 240 Ill. 12, 88 N. E. 180.

\$3,000, permanent impairment of earning capacity. *Wesley v. Chicago, St. P. & K. C. Ry.*, 84 Ia. 441, 51 N. W. 163.

\$3,000, permanent impairment of earning capacity. *Nicholson C. M. Co. v. Moulden*, 143 Ky. 348, 136 S. W. 621.

\$3,000, permanent injury and impairment of earning capacity. *Galveston, H. & S. A. Ry. v. Garcia*, 45 Tex. Civ. App. 229, 100 S. W. 198.

\$3,500, severe burns, permanent impairment of earning capacity. *Dow v. Sunset T. & T. Co.*, 157 Cal. 182, 106 Pac. 587.

\$3,500, permanent and progressive injuries. *Mowbray v. Brooklyn Heights R. R.*, 59 App. Div. 239, 69 N. Y. Supp. 435.

\$3,800, injury to spine, probably permanent disability. *Luper v. Henry*, 59 Wash. 33, 109 Pac. 208.

\$4,000 (reduced from \$5,000), hearing of one ear destroyed, sight impaired, ability to work permanently impaired. *Kennedy v. Chicago, M. & S. P. Ry.*, 57 Minn. 227, 58 N. W. 878.

\$4,000, capacity for labor reduced one-half. *Dillingham v. Richards* (Tex. Civ. App.), 27 S. W. 1061.

\$4,200, concussion of brain, permanent injury. *Peltomaa v. Katahdin P. & P. Co.*, 149 Fed. 282.

\$4,500 (reduced from \$5,500), helpless and incurable invalid. *Partello v. Missouri Pac. Ry.* (Mo. App.), 107 S. W. 473.

\$4,500, permanent disability. *Baker v. Hamburg-American Packet Co.*, 179 Fed. 271.

\$5,000, spine injured, leg shortened, earning capacity permanently reduced. *Ft. Smith, A. & S. Co. v. Nedry* (Ark.), 140 S. W. 711.

\$5,000, miscarriage, total disability. *Colorado Springs & I. Ry. v. Nichols*, 41 Colo. 272, 92 Pac. 691.

\$5,000, severe injuries, inability to work. *Chicago, B. & Q. Ry. v. Sullivan*, 21 Ill. App. 580.

\$5,000, serious injuries, inability to work. *Karczenska v. Chicago*, 144 Ill. App. 516, affirmed, 239 Ill. 483, 88 N. E. 188.

\$5,000, injury to spine, inability to work. *Flanagan v. Chicago City Ry.*, 145 Ill. App. 56.

\$5,000, injury to spine, paralysis. *Louisville & N. R. R. v. Wilkins*, 143 Ky. 572, 136 S. W. 1024.

\$5,000, disability to follow trade. *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283.

\$5,000, section hand, disability to work. *Dean v. Kansas City, S. L. & C. R. R.*, 199 Mo. 386, 97 S. W. 910.

\$5,000, permanent injuries, disability to earn. *Torreyson v. United Rys. Co.*, 144 Mo. App. 626, 129 S. W. 409.

\$5,000, total disability to work. *Stewart v. St. Louis S. W. Ry.*, 149 Mo. App. 456, 130 S. W. 441.

\$5,000, total disability for ordinary



damages may be recovered and allowed.<sup>174</sup> The commonest

work. *Mayer v. Liebmann*, 16 App. Div. 54, 44 N. Y. Supp. 1067.

\$5,000, permanent impairment of earning capacity. *Davey v. Rhode Island Co.*, 29 R. I. 49, 68 Atl. 946.

\$5,000. *Missouri, K. & T. Ry. v. Rodgers* (Tex. Civ. App.), 35 S. W. 412.

\$6,000, permanent disability to work at trade. *Chicago v. Bork*, 128 Ill. App. 357, affirmed, 227 Ill. 60, 81 N. E. 27.

\$6,000, permanent and increasing impairment of capacity to work. *Eckels v. Boylan*, 136 Ill. App. 258.

\$6,000, disfigurement and permanent disability of child. *Bennett v. Brooklyn Heights R. R.*, 1 App. Div. 205, 37 N. Y. Supp. 447.

\$6,000, permanent disability. *Bryer v. Foerster*, 7 App. Div. 611, 41 N. Y. Supp. 617.

\$6,166.79, total incapacity. *Eicholz v. Niagara Falls H. P. & M. Co.*, 68 App. Div. 441, 73 N. Y. Supp. 843.

\$6,500, permanent disability for profession of nurse. *Vredenburgh v. N. Y. C. & H. R. R. R.*, 58 Hun, 607, 12 N. Y. Supp. 18.

\$6,500, paralysis and total disability.

*Atchison, T. & S. F. Ry. v. Click* (Tex. Civ. App.), 32 S. W. 226.

\$6,500, permanent impairment of earning capacity. *Galveston, H. & S. A. Ry. v. Waldo* (Tex. Civ. App.), 32 S. W. 783.

\$6,565, permanent injury and impairment of capacity to labor of married woman. *Miller v. Boone County*, 95 Iowa, 5, 63 N. W. 352.

\$7,000, third trial, business man compelled to give up business. *Southern Ry. v. Goddard* (Ky.), 108 S. W. 890.

\$7,000, earning capacity of man of twenty-seven greatly and permanently diminished. *Louisville & N. R. R. v. Cox* (Ky.), 141 S. W. 59.

\$7,000, earning capacity of man greatly and permanently reduced. *Weeks v. Fletcher* (R. I.), 71 Atl. 881.

\$7,500 (reduced from \$9,500), total disability of strong man. *Booker v. Southwest Mo. R. R.*, 144 Mo. App. 273, 128 S. W. 1012.

\$7,500, total permanent disability of man of twenty-nine, already of impaired ability. *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149.

<sup>174</sup> Where the injury made the plaintiff a cripple, the following verdicts have been upheld:

\$1,000. *Weil v. Kreutzer*, 134 Ky. 563, 121 S. W. 471.

\$1,500. *Sidmonds v. Brooklyn Heights R. R.*, 69 App. Div. 471, 74 N. Y. Supp. 989.

\$1,750. *Oolitic Stone Co. v. Ridge*, (Ind.), 91 N. E. 944.

\$2,500. *Miller v. Canton*, 123 Mo. App. 325, 100 S. W. 571.

\$3,200. *Poli v. Numa Block Coal Co.*, 149 Ia. 104, 127 N. W. 1105.

\$3,500. *W. G. Morel & Co. v. Lehman*, 159 Fed. 124, 86 C. C. A. 512.

\$6,000. *Freeman v. Ortiz* (Tex. Civ. App.), 136 S. W. 113.

\$7,500. *Thomas v. Union Ry.*, 18 App. Div. 185, 45 N. Y. Supp. 920.

\$8,000. *Heer v. Warren-Scharf Asphalt Paving Co.*, 118 Wis. 57, 94 N. W. 789.

\$10,000. *Foster v. Missouri Pac. Ry.*, 115 Mo. 165, 21 S. W. 916.

\$12,500. *El Paso Electric Ry. v. Shaklee* (Tex. Civ. App.), 138 S. W. 188.

\$15,000. *Patzke v. Minneapolis & S. L. Ry.*, 109 Minn. 97, 129 N. W. 124.

\$15,000. *International & G. N. R. R. v. Hugen*, 45 Tex. Civ. App. 326, 100 S. W. 1000.

The following verdicts were held excessive:

\$15,000; reduced to \$10,000. *Furnish v. Missouri Pac. Ry.*, 102 Mo. 438, 13 S. W. 1044, 22 Am. St. Rep. 781.

\$13,500; reduced to \$7,000. *Coppins v. New York C. & H. R. R. R.*, 48 Hun, 292.

and in some respects the most serious injury of this sort is the

\$7,660, conductor of freight train, age thirty, permanently disabled from business. *Harker v. Burlington, C. R. & N. Ry.*, 88 Ia. 409, 55 N. W. 316.

\$8,000, disfigurement and serious impairment of earning capacity of man. *St. Louis, I. M. & S. Ry. v. Glossup*, 88 Ark. 225, 114 S. W. 247.

\$8,000, leg shortened, curvature of spine, inability to do hard work. *Anderson v. Pittsburg Coal Co.*, 108 Minn. 455, 122 N. W. 794.

\$8,000, permanent injury interfering with earning power of physician. *Quinn v. O'Keefe*, 9 App. Div. 68, 75, 41 N. Y. Supp. 116.

\$8,000, disabling brakeman from acting as such, shock to nervous system and pain. *Galveston, H. & S. A. Ry. v. Stoy*, 44 Tex. Civ. App. 448, 99 S. W. 135.

\$8,000, injury to spine and chest of boy of fourteen, earning capacity permanently impaired. *Ferguson v. Truax*, 132 Wis. 478, 110 N. W. 395, 111 N. W. 657, 112 N. W. 513.

\$8,800, bookkeeper, age fifty-eight, permanent total disability, life shortened. *Cooper v. St. Paul City Ry.*, 55 Minn. 134, 56 N. W. 42.

\$9,000, permanent incapacity of minor, destruction of function. *Jones v. Bunker Hill & S. M. & C. Co.*, 124 Fed. 675.

\$9,000, total destruction of earning capacity of man of fifty-six, earning at most \$1,500 a year. *Furman v. Brooklyn Heights R. R.*, 25 App. Div. 133, 49 N. Y. Supp. 194.

\$9,000, total inability to pursue trade of printer, age forty-two. *Houston City St. Ry. v. Medlenka*, 17 Tex. Civ. App. 621, 43 S. W. 1028.

\$9,000, negro, age twenty-one, fracture of skull, operation, paralysis, eyesight affected, mind impaired, total inability to work. *Texas & N. O. R. R. v. McCoy*, 54 Tex. Civ. App. 278, 117 S. W. 446.

\$10,000, locomotive fireman, age forty-one, paralysis and total disability. *Central of Ga. Ry. v. Mote*, 131 Ga. 166, 62 S. E. 164.

\$10,000, boy of sixteen, permanent helpless invalid. *B. Shoninger Co. v. Mann*, 121 Ill. App. 275, affirmed, 219 Ill. 242, 76 N. E. 354.

\$10,000, woman of thirty, employed in business, permanent impairment of ability to labor. *Chicago v. McNally*, 128 Ill. App. 375, affirmed, 227 Ill. 14, 81 N. E. 23.

\$10,000, permanent reduction of earning capacity by two-thirds. *Wilcke v. Henrotin*, 146 Ill. App. 481, affirmed, 241 Ill. 169, 89 N. E. 329.

\$10,000, physician, permanent disability to practice. *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138, 1 N. E. 364, 52 Am. Rep. 653.

\$10,000, man of thirty-five, sight and hearing impaired, skull fractured, permanent incapacity from pursuing vocation. *Indianapolis St. Ry. v. Kane*, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721.

\$10,000, scalding, intense suffering, deaf, inability to do hard work. *St. Louis & S. F. R. R. v. McLain*, 80 Tex. 85, 15 S. W. 789.

\$10,000, locomotive engineer, age forty-four, permanently disabled from pursuing occupation. *Texas & N. O. R. R. v. Middleton*, 46 Tex. Civ. App. 497, 103 S. W. 203.

\$10,000, healthy man rendered unable to do farm work. *Missouri, K. & T. Ry. v. Dunbar* (Tex. Civ. App.), 122 S. W. 574.

\$10,000, brakeman totally disabled for manual work, great suffering. *Daniels v. Union Pac. Ry.*, 6 Utah, 357, 23 Pac. 762.

\$10,325, permanent disability and great suffering. *Van Orman v. Lake Shore & M. S. Ry.*, 152 Mich. 185, 115 N. W. 968.

\$10,500, woman of thirty-eight, in business, permanently incapacitated.

crippling of a leg; or some part of it; and many verdicts giving

*Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

\$11,000, fireman, right arm rendered useless, permanent injury. *Baird v. New York Cent. & H. R. R. R.*, 64 App. Div. 14, 71 N. Y. Supp. 734.

\$11,500, young vigorous man disabled from manual labor, great pain. *Citizens' Telephone Co. v. Wakefield (Ky.)*, 126 S. W. 127.

\$11,500, brakeman, age twenty-seven, inability to earn living. *Missouri, K. & T. Ry. v. Chambers*, 17 Tex. Civ. App. 487, 43 S. W. 1090.

\$12,000, permanent illness and total disability of man twenty-five years old. *Dennison L. & P. Co. v. Patton (Tex. Civ. App.)*, 135 S. W. 1040.

\$12,500, permanent incapacity from manual labor of man of forty-five. *Maw v. Coast Lumber Co.*, 19 Ida. 396, 114 Pac. 9.

\$12,500, man of forty-four, physical wreck, earning power permanently impaired. *Louisville & N. R. R. v. Smith*, 134 Ky. 47, 122 S. W. 806.

\$12,500, physician, loss of faculties, forced to abandon practice. *Gulf, C. & S. F. Ry. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608.

\$12,500, man of fifty-two totally incapacitated for work. *International & G. N. R. R. v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051.

\$12,750, woman of twenty-two, mental and physical faculties permanently impaired. *Hoskovec v. Omaha St. Ry.*, 85 Neb. 295, 123 N. W. 305.

\$14,000, man of fifty-nine, physical wreck for life. *Wallace v. Vacuum Oil Co.*, 12 N. Y. Supp. 425.

\$14,000, girl of fifteen, fractured skull, intense pain, epileptic, insanity or death likely, constant care. *Van De Bogart v. Marinette & M. P. Co.*, 132 Wis. 367, 112 N. W. 443.

\$14,583, brakeman of twenty-six, earning capacity seriously diminished by injury to spine. *Missouri, K. & T.*

*Ry. v. Hawley (Tex. Civ. App.)*, 123 S. W. 726.

\$15,000, woman of twenty-nine, confirmed invalid. *Chicago Union Tract. Co. v. May*, 125 Ill. App. 144, affirmed, 221 Ill. 530, 77 N. E. 933.

\$15,000, mental and physical incapacity of woman. *Terre Haute & I. R. R. v. Sheeks*, 155 Ind. 74, 56 N. E. 534.

\$15,000, incurable paralysis of left side. *Bishop v. St. Paul City Ry.*, 48 Minn. 26, 50 N. W. 927.

\$15,000, house-painter deformed, and permanently incapacitated for labor. *Schneider v. Second Ave. R. R.*, 15 N. Y. Supp. 556.

\$15,000, fireman, twenty-one years old, spine injured, incapacitated for work. *Galveston, H. & S. A. Ry. v. Garrett*, 44 Tex. Civ. App. 406, 98 S. W. 932.

\$15,000, boy of seventeen, serious and permanent internal injuries and nervous troubles. *International & G. N. R. R. v. Miller (Tex. Civ. App.)*, 124 S. W. 109.

\$15,000, paralysis of woman of thirty, helpless for remainder of life. *Sears v. Seattle Consol. St. R. R.*, 6 Wash. 227, 33 Pac. 389, 1081.

\$16,000, man of fifty-five, double rupture, physical wreck, inability to perform serious labor. *Freeman v. Cleary (Tex. Civ. App.)*, 136 S. W. 521.

\$16,500, lawyer of thirty-nine, income of \$7,000 to \$9,500, permanent injury to throat, permanent loss of income of about \$4,000 a year. *Johnson v. Union Pac. R. R.*, 35 Utah, 285, 100 Pac. 390.

\$17,000, total physical and mental wreck. *Dupuis v. Saginaw Valley Trac. Co.*, 146 Mich. 151, 109 N. W. 413.

\$18,000, skilled mechanic, thirty-two years old, disfigured, permanently unable to follow trade as mechanic. *McCullough v. Ill. Steel Co.*, 148 Ill. App. 566.

\$20,000, man of twenty-nine, paraly-

ing compensation for damages of this kind have been consid-

sis, nerves shattered, sight and hearing affected. *Galveston, H. & S. A. Ry. v. Nass* (Tex. Civ. App.), 57 S. W. 910.

\$20,000, man of twenty-nine, permanent injury. *Postal T. C. Co. v. Coote* (Tex. Civ. App.), 57 S. W. 912.

\$20,000, locomotive engineer of forty-nine, great pain, paralyzed, total disability. *Galveston, H. & S. A. Ry. v. Cherry* (Tex. Civ. App.), 98 S. W. 898.

\$20,000, expert printer, paralyzed and permanently incapable. *Missouri, K. & T. Ry. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 601.

\$20,000, switchman, great physical and mental suffering, invalid for life, total disability. *Galveston, H. & S. A. Ry. v. Hanson* (Tex. Civ. App.), 125 S. W. 63.

\$20,000, railroad section man, forty-three years old, paralyzed, permanent total incapacity. *Tills v. Great Northern Ry.*, 50 Wash. 536, 97 Pac. 737.

\$20,000, miner of thirty-seven, permanent incapacity and suffering. *Starck v. Washington U. C. Co.*, 61 Wash. 213, 112 Pac. 235.

\$23,750, young man crippled by injury to spine, paralysis. *Missouri, K. & T. Ry. v. Farris* (Tex. Civ. App.), 120 S. W. 535.

\$25,000. *Dieffenbach v. New York, L. E. & W. R. R.*, 38 N. Y. Supp. 788.

\$30,000, man of thirty-six in extensive business, paralysis and total disability to engage in business. *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

\$30,000, boy of eighteen, sight impaired, mutilated, face disfigured, excruciating pain, total disability. *Waters-Pierce Oil Co. v. Snell*, 47 Tex. Civ. App. 413, 106 S. W. 170.

\$30,000, railroad brakeman, complete paralysis, helpless. *Houston & T. C. R. R. v. Gray* (Tex. Civ. App.), 137 S. W. 729.

\$40,000, man of twenty-nine, private secretary, comminuted fracture of skull, progressive traumatic epilepsy.

*Hughes v. Harbor & S. B. & S. Assoc.*, 131 App. Div. 185, 115 N. Y. Supp. 320.

The following verdicts were held excessive:

\$50,000, brakeman, twenty-two years old, totally incapacitated, died during trial from broken back; reduced to \$25,000. *St. Louis, I. M. & S. Ry. v. Brown*, 97 Ark. 505, 140 S. W. 279.

\$30,000, fireman crippled for life, mind unimpaired; reduced to \$20,000. *Strand v. Great Northern Ry.*, 101 Minn. 85, 111 N. W. 958, 112 N. W. 987.

\$30,000, disability; reduced to \$20,000. *Cleveland H. V. & T. Ry. v. Shannon*, 4 Oh. Cir. Ct. 449.

\$30,000, girl of eight; reduced to \$12,000. *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560, 43 Pac. 528.

\$25,000, man of thirty-one became physical wreck; reduced to \$12,050. *Foley v. Everett*, 142 Ill. App. 250.

\$25,000, man of forty-one became physically helpless; reduced to \$20,000. *Waterman v. Chicago & A. R. R.*, 82 Wis. 613, 52 N. W. 247.

\$21,000, woman, partial disability. *Vester v. Rhode Island Co. (R. I.)*, 67 Atl. 444.

\$15,000, young man, earning capacity partially impaired. *Chitty v. St. Louis, I. M. & S. Ry.*, 148 Mo. 64, 49 S. W. 868.

\$12,000, former partial disability made total. *Louisville & N. R. R. v. Kingman*, 18 Ky. L. Rep. 82, 35 S. W. 264.

\$9,000, diminished earning power of mason's tender who had earned \$2 a day; reduced to \$5,000. *Morris v. Eighth Ave. R. R.*, 68 Hun, 39, 22 N. Y. Supp. 666.

\$9,000, woman of fifty-five, housekeeper; reduced to \$6,000. *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

\$8,000, partly permanent disability. *Campbell v. N. A. Brewing Co.*, 47 N. Y. Supp. 992.

\$8,000, permanent injury to unskilled

ered.<sup>175</sup> In many cases also the court has considered and has

laborer; reduced to \$5,000. *Jones v. Niagara Junction Ry.*, 63 App. Div. 607, 71 N. Y. Supp. 647.

\$7,500, partial incapacity for work; reduced to \$4,000. *Heck v. International S. P. Co.*, 77 N. J. L. 4, 71 Atl. 150.

<sup>175</sup> In cases of crippling a leg the following verdicts have been upheld:

\$750. *Beller v. Levy*, 68 Misc. 182, 127 N. Y. Supp. 237.

\$1,000. *Morgan v. Fremont County*, 92 Ia. 644, 61 N. W. 231.

\$1,000. *Weil v. Kreutzer*, 134 Ky. 47, 121 S. W. 471, 24 L. R. A. (N. S.) 557.

\$1,125. *Louisville & N. R. R. v. Campbell*, 122 S. W. 848 (Ky.).

\$1,200 (reduced from \$2,000) *Washington L. P. Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977.

\$1,200. *Cook v. Chehalis River Lumber Co.*, 48 Wash. 619, 94 Pac. 189.

\$1,450. *Fitzgerald v. Dobson*, 78 Me. 559, 7 Atl. 704.

\$1,500. *Armstrong v. Auburn*, 84 Neb. 842, 122 N. W. 43.

\$1,650. *Larsen v. Sedro-Woolley*, 49 Wash. 134, 94 Pac. 938.

\$2,000. *Consolidated Coal Co. v. Shepherd*, 122 Ill. App. 323; affirmed 220 Ill. 123, 77 N. E. 133.

\$2,000. *Bowling Green Stone Co. v. Capshaw*, 64 S. W. 507, 23 Ky. L. Rep. 945.

\$2,000. *Winn v. Metropolitan St. Ry.*, 121 Mo. App. 623, 97 S. W. 547.

\$2,000. *Biggie v. Chicago, B. & Q. R. R.* (Mo. App.), 140 S. W. 602.

\$2,000. *Wilcox v. Rhode Island Co.*, 29 R. I. 292, 70 Atl. 913.

\$2,500. *Carey v. Brooklyn Heights R. R.*, 124 App. Div. 524, 108 N. Y. Supp. 1034.

\$2,800. *Lattimore v. Union E. L. & P. Co.*, 128 Mo. App. 37, 106 S. W. 543.

\$3,000. *Woodward Iron Co. v. Sheehan*, 166 Ala. 429, 52 So. 24.

\$3,000. *Arkansas Lumber Co. v. Wallace* (Ark.), 139 S. W. 534.

\$3,500. *Rayburn v. Central Iowa Ry.*, 74 Ia. 637, 34 N. W. 621.

\$3,500. *Napier v. Brooklyn Heights R. R.*, 68 App. Div. 200, 74 N. Y. Supp. 7.

\$3,650. *Gorham v. Kansas City & S. Ry.*, 113 Mo. 408, 20 S. W. 1060.

\$4,000. *Bryant v. Omaha & C. B. R. & B. Co.*, 98 Ia. 483, 67 N. W. 392.

\$4,000. *Goins v. Moberly*, 127 Mo. 116, 29 S. W. 985.

\$4,346.93. *Bertsch v. Metropolitan St. Ry.*, 68 App. Div. 228, 74 N. Y. Supp. 238.

\$4,500. *Foels v. Tonawanda*, 59 Hun, 567, 14 N. Y. Supp. 46.

\$5,000. *Greenway v. Taylor County*, 144 Ia. 332, 122 N. W. 943.

\$5,000. *Stewart v. St. Louis Southwestern Ry.*, 157 Mo. App. 225, 130 S. W. 441.

\$5,000. *Galveston H. & S. A. Ry. v. Parrish* (Tex. Civ. App.), 43 S. W. 536.

\$5,000. *Hoffman v. Rib Lake Lumber Co.*, 136 Wis. 388, 117 N. W. 789.

\$6,000. *Chicago & J. E. Ry. v. Patton*, 122 Ill. App. 174.

\$6,000. *Molway v. Chicago*, 144 Ill. App. 509, 239 Ill. 486, 88 N. E. 485.

\$6,000. *Chamlee v. Planters' Hotel Co.*, 155 Mo. App. 144, 134 S. W. 123.

\$6,090. *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743.

\$6,500. *Sellick v. J. Langdon & Co.*, 59 Hun. 627, 13 N. Y. Supp. 858.

\$6,583.33. *Berry v. St. Louis, M. & S. E. R. R.*, 214 Mo. 593, 114 S. W. 27.

\$7,500. *International & G. N. R. R. v. Clark* (Tex. Civ. App.), 125 S. W. 959.

\$8,000. *Henry v. Sioux City & P. Ry.*, 75 Ia. 84, 39 N. W. 193, 9 Am. St. Rep. 457.

upheld or set aside as excessive verdicts for crippling some part of an arm.<sup>176</sup>

### § 1356. Loss of a member: leg or foot.

For the loss of a leg, verdicts take a wide range, according to

\$8,000. *Stephens v. Schmidt*, 80 N. J. L. 193, 76 Atl. 332.

\$8,500. *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174.

\$9,000 (of which \$1,000 for expenses); *International & G. N. Ry. v. Brett*, 61 Tex. 483.

\$10,000. *Field v. Winheim*, 123 Ill. App. 227.

\$10,000. *Galveston v. Posnainsky*, 62 Tex. 118, 50 Am. Rep. 517.

\$12,000. *International & G. N. R. R. v. Poloma* (Tex. Civ. App.), 123 S. W. 1149.

\$14,000. *Yazoo & M. V. R. R. v. Scott*, 95 Miss. 43, 48 So. 239.

\$15,000. *Mitchell v. Broadway & Seventh Ave. R. R.*, 70 Hun, 387, 24 N. Y. Supp. 32.

\$15,000. *Chicago City Ry. v. Taylor*, 68 Ill. App. 613.

\$20,000. *Clark v. St. L. & S. Ry.* (Mo.), 137 S. W. 583.

\$20,000. *Lynch v. American Linseed Co.*, 122 App. Div. 428, 107 N. Y. Supp. 458.

The following verdicts were held excessive:

\$40,000. *St. Louis; I. M. & S. Ry. v. Waren*, 65 Ark. 619, 48 S. W. 222.

\$18,000; reduced to \$16,000. *San Antonio & A. P. Ry. v. Connell*, 27 Tex. Civ. App. 533, 66 S. W. 246.

\$15,000; reduced to \$10,000. *Chitty v. St. Louis, I. M. & S. Ry.*, 166 Mo. 435, 65 S. W. 959.

\$15,000; reduced to \$8,000. *Chapman v. Atlantic Ave. R. R.*, 35 N. Y. Supp. 1045.

\$10,000; reduced to \$5,000. *Cogswell v. West St. & N. E. E. Ry.*, 5 Wash. 46, 31 Pac. 411.

\$7,500; reduced to \$4,000. *Kirby v. St. Louis & S. F. R. R.* (Mo. App.), 130 S. W. 69.

\$5,500; reduced to \$3,500. *Dent v. Springfield Trac. Co.* (Mo. App.), 129 S. W. 1044.

\$5,000; reduced to \$4,000. *Zeigler v. Metropolitan St. Ry.* (Mo. App.), 134 S. W. 1067.

<sup>176</sup> In cases of crippling an arm, or part of it, the following verdicts have been upheld:

\$500. *Yount v. Strickland*, 17 Wyo. 526, 101 Pac. 942.

\$1,000. *MacMurray v. Sioux City*, 150 Ia. 257, 129 N. W. 950.

\$1,000. *Kielty v. Buehler-Cooney Const. Co.*, 121 Mo. App. 58, 97 S. W. 998.

\$1,250. *Gulf, C. & S. F. Ry. v. Sauter*, 46 Tex. Civ. App. 309, 103 S. W. 201.

\$1,300. *Illinois Cent. R. R. v. Stewart*, 130 Ill. App. 197; affirmed 230 Ill. 204, 82 N. E. 590.

\$1,400. *Yellow T. L. Co. v. Ford*, 141 Ky. 5, 131 S. W. 1010.

\$1,995. *Shalgren v. Red Cliff Lumber Co.*, 95 Minn. 450, 104 N. W. 531.

\$2,500. *Chicago City Ry. v. Shreve*, 128 Ill. App. 462; affirmed 226 Ill. 530, 80 N. E. 1049.

\$2,500. *Graff v. Illinois Steel Co.*, 146 Ill. App. 238.

\$2,500. *Gregory v. Slaughter*, 124 Ky. 345, 99 S. W. 247, 8 L. R. A. (N. S.) 1228.

\$3,000. *Nicholson C. M. Co. v. Moulden* (Ky.), 136 S. W. 620.

\$3,500. *Louisville Cooperage Co. v. Farmer*, 109 S. W. 893, 32 Ky. L. Rep. 1110.

the earning power of the plaintiff, the amount of pain and suffering and of medical expenses, and the nature of the accompanying injuries; and large verdicts have been sustained;<sup>177</sup>

\$3,500. *Detzur v. B. Stroh Brewing Co.*, 119 Mich. 282, 77 N. W. 948.

\$3,500. *Sampson v. St. Louis & S. F. R. R.* (Mo. App.), 138 S. W. 98.

\$4,000. *McCoy v. Milwaukee St. Ry.*, 88 Wis. 56, 59 N. W. 453.

\$4,500. *Robinson v. St. Louis & S. F. R. R.*, 133 Mo. App. 101, 112 S. W. 730.

\$4,500. *Barree v. Cape Girardeau*, 132 Mo. App. 182, 112 S. W. 724.

\$4,750 (reduced from \$7,500). *Nolan v. Stillwater L. Co.* (Wash.), 118 Pac. 340.

\$4,750. *Banderob v. Wisconsin Cent. Ry.*, 133 Wis. 249, 113 N. W. 738.

\$6,200. *Weinhardt v. New Orleans*, 125 La. 351, 51 So. 286.

\$7,500. *Pearson v. Alaska Pac. S. S. Co.*, 51 Wash. 560, 99 Pac. 753.

\$7,922. *Atchison, T. & S. F. Ry. v. Seeger* (Tex. Civ. App.), 126 S. W. 1170.

\$8,000. *O'Keefe v. Eighth Ave. R. R.*, 33 App. Div. 324, 53 N. Y. Supp. 940.

\$9,500. *Knapp v. Sioux City & P. Ry.*, 71 Ia. 41, 32 N. W. 18.

\$10,000. *Cleveland, C. C. & S. L. R. R. v. Hadley*, 170 Ind. 204, 82 N. E. 1025, 16 L. R. A. (N. S.) 527.

In the following cases verdicts were held excessive:

\$25,000. *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 36 Am. St. Rep. 595, 14 L. R. A. 677.

\$10,000; reduced to \$6,000. *Texas & N. O. R. R. v. Geiger*, 55 Tex. Civ. App. 1, 118 S. W. 179.

\$5,000; reduced to \$2,000. *Cordrey v. Washington Stevedore Co.* (Wash.), 118 Pac. 324.

\$4,500. *Georgetown W. G. E. & P. Co. v. Forwood* (Ky.), 113 S. W. 112.

<sup>177</sup> The following verdicts for loss of a leg have been upheld:

\$2,286. *The William Branfoot*, 48 Fed. 914 (\$500 of this was for suffering).

\$2,500. *Williamson v. Brooklyn Heights R. R.*, 53 App. Div. 399, 65 N. Y. Supp. 1054.

\$3,000. *The Iroquois*, 113 Fed. 964.

\$4,000. *Cleveland, C. C. & S. L. Ry. v. Foland* (Ind. App.), 88 N. E. 787.

\$4,300. *Galveston, H. & S. A. Ry. v. Pitts* (Tex. Civ. App.), 42 S. W. 255.

\$5,000. *Brophy v. Illinois Steel Co.*, 144 Ill. App. 309, affirmed 242 Ill. 55, 89 N. E. 684.

\$5,500. *Chesapeake & O. Ry. v. Fortune*, 107 Va. 412, 59 S. E. 1095.

\$6,000. *Hebert v. Kingston Lumber Co.*, 126 La. 775, 52 So. 1021.

\$7,000 (reduced from \$10,000). *Buckry-Ellis v. Missouri Pac. Ry.* (Mo. App.), 138 S. W. 912.

\$7,000. *Cosselman v. Dunfee*, 59 App. Div. 467, 69 N. Y. Supp. 271.

\$7,500. *Corn Products Refining Co. v. King*, 168 Fed. 892, 94 C. C. A. 304.

\$7,500. *Thompson v. Great Northern Ry.*, 79 Minn. 291, 82 N. W. 637.

\$7,500. *Flaherty v. St. Louis Transit Co.*, 207 Mo. 318, 106 S. W. 15.

\$8,000. *Whalen v. St. Louis, K. C. & N. R. R.*, 60 Mo. 323.

\$8,000. *Galveston, H. & S. A. Ry. v. Dehnisch* (Tex. Civ. App.), 57 S. W. 64.

\$8,500. *Missouri, K. & T. Ry. v. Price*, 48 Tex. Civ. App. 210, 106 S. W. 700.

\$8,500. *Odegard v. North Wis. Lumber Co.*, 130 Wis. 659, 110 N. W. 809.

\$9,000. *Price & Lucas C. & V. Co. v. Haley*, 125 S. W. 720, 137 Ky. 305.

\$9,450 (reduced from \$15,000). *Sorenson v. Oregon Power Co.*, 47 Ore. 24, 82 Pac. 10.

On the other hand verdicts have been found excessive in many

\$10,000. *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501.

\$10,000. *Louisiana & A. R. R. v. Hobbs*, 87 Ark. 641, 113 S. W. 46.

\$10,000. *Pennsylvania Co. v. Reidy*, 99 Ill. App. 477.

\$10,000. *Momence Stone Co. v. Groves*, 100 Ill. App. 98.

\$10,000. *Eckels v. Edison*, 139 Ill. App. 75.

\$10,000. *Louisville & N. R. R. v. Mitchell*, 87 Ky. 327, 8 S. W. 706.

\$10,000. *Louisville & N. R. R. v. Popp*, 96 Ky. 99, 112, 27 N. W. 992, 16 Ky. L. Rep. 369.

\$10,000. *Hollenbeck v. Missouri Pac. Ry.*, 141 Mo. 113, 38 S. W. 727.

\$10,000. *Swearingen v. Consol. Troup Min. Co.*, 212 Mo. 524, 111 S. W. 545.

\$10,000. *Garoni v. Compagnie Nationale*, 14 N. Y. Supp. 798.

\$10,000. *Houston & T. C. Ry. v. Kelley*, 13 Tex. Civ. App. 1, 34 S. W. 809.

\$10,000. *Gulf, C. & S. F. Ry. v. Warner*, 22 Tex. Civ. App. 167, 54 S. W. 1064.

\$10,000. *International & G. N. R. R. v. Morin* (Tex. Civ. App.), 116 S. W. 656.

\$10,000. *Missouri, K. & T. Ry. v. Redus*, 55 Tex. Civ. App. 205, 118 S. W. 208.

\$10,000. *Yerkes v. Northern Pac. Ry.*, 112 Wis. 184, 88 N. W. 33.

\$11,000. *Louisville Ry. v. Bryant* (Ky.), 134 S. W. 182.

\$11,500. *Hill v. Starin*, 65 App. Div. 361, 73 N. Y. Supp. 91.

\$11,500. *Texas & P. Ry. v. Johnson* (Tex. Civ. App.), 34 S. W. 186.

\$12,000, second verdict. *Missouri Pac. Ry. v. Mackey*, 33 Kan. 298, 6 Pac. 291.

\$12,000. *Louisville & N. R. R. v. Schroader*, 113 S. W. 874 (Ky.)

\$12,000. *Akersloot v. Second Ave. R. R.*, 15 N. Y. Supp. 864.

\$12,500. *Eichhorn v. Central R. R.*, 185 Fed. 624.

\$12,500. *Kentucky Cent. Ry. v. Ryle*, 18 S. W. 938, 13 Ky. L. Rep. 862.

\$12,500. *Texas & P. Ry. v. Johnson* (Tex. Civ. App.), 34 S. W. 186.

\$12,500. *Texas & N. O. R. R. v. Parsons* (Tex. Civ. App.), 109 S. W. 240.

\$13,500. *Parker v. Fairbanks-Morse Mfg. Co.*, 130 Wis. 525, 110 N. W. 409.

\$13,740. *Texas & N. O. Ry. v. Carr* (Tex. Civ. App.), 42 S. W. 126.

\$14,000. *Galveston, H. & N. Ry. v. Murphy*, 52 Tex. Civ. App. 420, 114 S. W. 443.

\$15,000. *Central of Ga. Ry. v. Forehand*, 128 Ga. 547, 58 S. E. 44.

\$15,000. *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450.

\$15,000. *Cleveland, C. C. & St. L. Ry. v. Lynn* (Ind.), 95 N. E. 577.

\$15,000. *Lee v. Powell Bros. & Sanders Co.*, 126 La. 51, 52 So. 214.

\$15,000. *Oglesby v. Missouri Pac. Ry.* (Mo.), 37 S. W. 829.

\$15,000. *Kalfur v. Broadway F. & M. A. R. R.*, 51 N. Y. Supp. 179, 54 N. Y. Supp. 503, 34 App. Div. 267.

\$15,000. *Missouri, K. & T. Ry. v. Harris*, 45 Tex. Civ. App. 542, 101 S. W. 506.

\$15,000. *Roth v. Union Depot Co.*, 13 Wash. 525, 546, 43 Pac. 641, 31 L. R. A. 855.

\$15,000. *Bugge v. Seattle Electric Co.*, 54 Wash. 483, 103 Pac. 824.

\$17,000. *Walsh v. New York Cent. & H. R. R.*, 140 App. Div. 1, 124 N. Y. Supp. 312.

\$18,000. *Murray v. Brooklyn City Ry.*, 7 N. Y. Supp. 900.

\$18,000. *Galveston, H. & S. A. Ry.*



cases.<sup>178</sup> For the loss of both legs very heavy damages have been allowed.<sup>179</sup> Much less damages will be permitted in the

*v. Hynes*, 21 Tex. Civ. App. 34, 50 S. W. 624.

\$20,000. *Burch v. Southern Pac. Co.*, 32 Nev. 75, 104 Pac. 225.

\$23,000. *Erickson v. Brooklyn Heights Ry.*, 11 Misc. 662, 32 N. Y. Supp. 915.

\$25,000. *Ehrman v. Brooklyn City R. R.*, 14 N. Y. Supp. 336.

\$25,000. *Reeks v. Seattle Electric Co.*, 54 Wash. 609, 104 Pac. 126.

<sup>178</sup> In the following cases verdicts were held excessive:

\$35,000; reduced to \$25,000. *Noakes v. New York Cent. & H. R. R.*, 121 App. Div. 716, 106 N. Y. Supp. 522.

\$30,000; reduced to \$20,000. *Fisher v. Barber* (Tex. Civ. App.), 130 S. W. 871.

\$25,000. *Tully v. New York & T. S. S. Co.*, 42 N. Y. Supp. 29, 11 App. Div. 630, 42 N. Y. Supp. 1134.

\$25,000. *Galveston H. & S. A. Ry. v. Bernard* (Tex. Civ. App.), 57 S. W. 686.

\$23,071; reduced to \$17,500. *O'Brien v. J. G. White & Co.*, 105 Me. 308, 74 Atl. 721.

\$20,320; reduced to \$12,000. *Aluminum Co. v. Ramsey*, 89 Ark. 522, 117 S. W. 568.

\$20,000; reduced to \$15,000. *Texas & N. O. Ry. v. Conway*, 44 Tex. Civ. App. 68, 98 S. W. 1070.

\$16,000, third verdict; reduced to \$9,000. *Bailey v. Rome, W. & O. R. R.*, 80 Hun, 4, 29 N. Y. Supp. 816.

\$15,000; reduced to \$12,000. *Wimber v. Iowa Cent. Ry.*, 114 Ia. 551, 87 N. W. 505.

\$15,000; reduced to \$10,000. *Brady v. Kansas City St. L. & C. R. R.*, 206 Mo. 509, 102 S. W. 978.

\$15,000. *Quirk v. Siegel-Cooper Co.*, 26 Misc. 244, 56 N. Y. Supp. 49.

\$10,000; reduced to \$6,000. *Bell v.*

*Globe Lumber Co.*, 107 La. 725, 31 So. 994.

\$9,500; reduced to \$6,000. *Rangenier v. Seattle Electric Co.*, 52 Wash. 401, 100 Pac. 842.

\$9,000; reduced to \$5,000. *Morris v. Eighth Ave. R. R.*, 68 Hun, 39, 22 N. Y. Supp. 666.

\$8,000. *Baker v. Public Service Ry.*, 79 N. J. L. 249, 75 Atl. 441.

<sup>179</sup> For the loss of both legs the following verdicts have been upheld:

\$7,500. *Macon & B. Ry. v. Parker*, 127 Ga. 471, 56 S. E. 616.

\$9,000. *Southern Pac. Co. v. Hart*, 53 Tex. Civ. App. 536, 116 S. W. 415.

\$13,000. *Colorado Midland Ry. v. O'Brien*, 16 Colo. 219, 27 Pac. 701.

\$15,000. *Illinois Cent. R. R. v. Stewart*, 63 S. W. 596, 23 Ky. L. Rep. 637.

\$20,000. *Pittsburgh, C. C. & St. L. Ry. v. Simons* (Ind.), 79 N. E. 911.

\$22,500. *St. Louis, S. W. Ry. v. Cleland*, 50 Tex. Civ. App. 499, 110 S. W. 122.

\$25,000. *St. Louis, I. M. & S. Ry. v. Rogers*, 93 Ark. 564, 126 S. W. 375, 1199.

\$27,500. *Union Pacific Ry. v. Connolly*, 77 Neb. 254, 109 N. W. 368.

\$30,000. *Pennsylvania Co. v. Barton*, 130 Ill. App. 573.

\$35,000. *Whitehead v. Wisconsin Cent. Ry.*, 103 Minn. 13, 114 N. W. 254, 467.

The following verdicts have been held excessive:

\$50,000; reduced to \$30,000. *Yazoo & M. V. R. R. v. Wallace*, 91 Miss. 492, 45 So. 857.

\$30,000. *Heddles v. Chicago & N. W. Ry.*, 74 Wis. 239, 42 N. W. 237.

case of loss of a foot <sup>180</sup> or a part of it,<sup>181</sup> or even for the loss of two feet.<sup>182</sup>

### § 1357. Loss of a member: arm, hand or finger.

Verdicts for loss of an arm have been considered; <sup>183</sup> generally

<sup>180</sup> For loss of a foot the following verdicts have been upheld:

\$6,950. *Elliott v. Newport St. Ry.*, 18 R. I. 707, 31 Atl. 694.

\$8,000. *San Antonio & A. P. Ry. v. Green*, 20 Tex. Civ. App. 5, 49 S. W. 670.

\$9,000. *Manley v. New York C. & H. R. R. R.*, 18 Misc. 502, 42 N. Y. Supp. 1076.

\$10,000. *St. Louis, I. M. & S. Ry. v. Sparks*, 81 Ark. 187, 99 S. W. 73.

\$10,000. *Chesapeake & O. Ry. v. Davis*, 60 S. W. 14, 22 Ky. L. Rep. 1156.

\$10,000. *Louisville & N. R. R. v. Mitchell*, 87 Ky. 327, 8 S. W. 706, 10 Ky. L. Rep. 211.

\$10,000. *Southern Ry. v. Isom*, 92 Miss. 82, 45 So. 424.

\$10,500. *Chipman v. Union Pac. R. R.*, 12 Utah, 68, 41 Pac. 562.

\$15,000. *Galveston, H. & N. Ry. v. Newport* (Tex. Civ. App.), 65 S. W. 657.

\$15,000. *Texas & N. O. R. R. v. McLeod* (Tex. Civ. App.), 131 S. W. 311.

\$16,000. *Galveston, H. & S. A. Ry. v. Abbey*, 29 Tex. Civ. App. 211, 68 S. W. 293.

In the following cases the amount was held excessive.

\$22,500. *International & G. N. R. R. v. Brice* (Tex. Civ. App.), 126 S. W. 613.

\$12,500; reduced to \$6,000. *Blades v. Des Moines City Ry.*, 146 Ia. 580, 123 N. W. 1057.

\$12,000; reduced to \$8,000. *Kroener v. Chicago, M. & St. P. Ry.*, 88 Ia. 16, 55 N. W. 177.

\$12,000; reduced to \$9,000. *Chicago,*

*B. & Q. R. R. v. Krayenbuhl*, 70 Neb. 766, 98 N. W. 44.

\$10,000. *Peri v. New York C. & H. R. R. R.*, 87 Hun, 499, 34 N. Y. Supp. 1009.

<sup>181</sup> For the loss of part of a foot the following verdicts were upheld:

\$1,500, big toe. *Jacobsen v. Rothschild*, 62 Wash. 127, 113 Pac. 261.

\$3,500, three toes, great pain. *Larkin v. New York & N. R. R.*, 19 N. Y. Supp. 479.

\$5,000, second verdict. *W. M. Ritter Lumber Co. v. Jordan*, 138 Ky. 522, 128 S. W. 596.

\$11,000. *Jordan v. New York & H. R. R.*, 16 Daly 130, 9 N. Y. Supp. 506.

<sup>182</sup> For the loss of both feet the following verdicts were upheld:

\$3,000. *Chicago & J. E. Ry. v. Barrows*, 128 Ill. App. 11.

\$9,500. *Texas & N. O. R. R. v. Buch* (Tex. Civ. App.), 125 S. W. 316.

\$10,000, and \$2,000 additional for pain. *The Ruth*, 178 Fed. 749.

The following were held excessive:

\$25,000; reduced to \$20,000. *Waldhiser v. H. & St. J. R. R.*, 87 Mo. 37.

\$11,620.11; reduced to \$5,000. *Pfeffer v. Buffalo Ry.*, 4 Misc. 465, 24 N. Y. Supp. 490.

\$8,000, one foot and four toes of other foot; reduced to \$4,000. *Wood v. Louisville & N. R. R.*, 88 Fed. 44.

<sup>183</sup> For loss of an arm the following verdicts have been upheld:

\$2,500. *St. Louis I. M. & S. Ry. v. Holmes* (Ark.), 131 S. W. 692.

\$5,000. *Collins v. Waterbury Co.*, 144 App. Div. 670, 129 N. Y. Supp. 661.

\$6,000. *The Buffalo*, 147 Fed. 304.

\$6,600. *Texarkana Tel. Co. v. Pemberton*, 86 Ark. 329, 111 S. W. 257.

speaking, of course, greater damages might be expected for loss of a right arm<sup>184</sup> than for loss of a left arm,<sup>185</sup> but in each case the amount of recovery will be controlled by other circumstances. For loss of a hand<sup>186</sup> or of part of a

\$6,975. *Schmolt v. H. W. Wright Lumber Co.*, 145 Wis. 577, 130 N. W. 499.

\$7,000. *Sobieski v. St. Paul & D. R. R.*, 41 Minn. 169, 42 N. W. 863.

\$8,000. *Anglo-American Packing & P. Co. v. Baier*, 31 Ill. App. 653.

\$8,000. *O'Keefe v. Eighth Ave. R. R.*, 33 App. Div. 324, 53 N. Y. Supp. 940.

\$9,119. *Missouri, K. & T. Ry. v. Kirkland*, 11 Tex. Civ. App. 528, 32 S. W. 588.

\$10,000. *South Covington & C. S. R. R. v. Weber*, 82 S. W. 986, 26 Ky. L. Rep. 922.

\$10,000. *Galveston, H. & S. A. Ry. v. Collins*, 24 Tex. Civ. App. 143, 57 S. W. 884.

\$10,170. *Louisville & N. R. R. v. Cason*, 116 S. W. 716 (Ky.).

\$12,500. *Rodney v. St. Louis, S. W. Ry.*, 127 Mo. 676, 28 S. W. 887, 30 S. W. 150.

\$14,000. *Galveston, H. & H. R. R. v. Bohan* (Tex. Civ. App.), 47 S. W. 1050.

\$15,000. *Greer v. Great Northern Ry.* (Minn.), 132 N. W. 6.

The following amounts have been held excessive:

\$20,000; reduced to \$12,000. *Renne v. U. S. Leather Co.*, 107 Wis. 305, 83 N. W. 473.

\$15,000 (reduced by trial court from \$25,000); further reduced to \$10,000. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307, 58 N. Y. Supp. 640.

\$13,000. *Louisville & N. R. R. v. Lowe* (Ky.), 66 S. W. 736.

\$10,000 (reduced from \$12,500); further reduced to \$7,000. *Burdiet v. Missouri Pac. Ry.*, 123 Mo. 236, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528.

\$6,000 (fourth verdict); reduced to

\$4,500. *Vaughn v. Glen Falls Portland Cement Co.*, 59 Misc. 230, 112 N. Y. Supp. 240.

<sup>184</sup> For loss of a right arm the following verdicts have been upheld:

\$6,500. *Illinois Cent. R. R. v. Price*, 72 Miss. 862, 18 So. 415.

\$7,500. *Kenny v. Marquette Cement Mfg. Co.*, 149 Ill. App. 173.

\$10,000. *St. Louis, S. W. Ry. v. Groves*, 44 Tex. Civ. App. 63, 97 S. W. 1084.

\$10,500. *Larson v. Haglin*, 103 Minn. 257, 114 N. W. 958.

\$11,916. *Chobanian v. Washburn Wire Co.*, (R. I.), 80 Atl. 394.

\$17,500. *The Fullerton*, 167 Fed. 1, 92 C. C. A. 463.

The following have been held excessive:

\$15,000; reduced to \$10,000. *Silberstein v. Houston, W. S. & P. F. R. R.*, 52 Hun, 611, 4 N. Y. Supp. 844.

\$15,000; reduced to \$12,000. *Bradbury v. Chicago, R. I. & P. Ry.* (Ia.), 128 N. W. 1.

<sup>185</sup> For loss of a left arm the following verdicts have been upheld:

\$7,000. *Atchison, T. & S. F. R. R. v. Sledge*, 68 Kan. 321, 74 Pac. 1111.

\$10,000. *Waggoner v. Porterfield* (Tex. Civ. App.), 118 S. W. 1094.

\$10,000. *Baltzer v. Chicago, M. & N. R. R.*, 89 Wis. 257, 60 N. W. 716.

\$12,000. *Lafferty v. Third Ave. R. R.*, 85 App. Div. 592, 83 N. Y. Supp. 405 (affirmed 176 N. Y. 594, 68 N. E. 1118).

The following verdict has been held excessive:

\$12,000; reduced to \$7,500. *Struble v. Burlington C. R. & N. Ry.*, 128 Ia. 158, 103 N. W. 142.

<sup>186</sup> For loss of a hand the following verdicts have been upheld:

hand <sup>187</sup> the damages must be expected to be less. For the loss of one or more fingers the amount of damages allowed must in all cases depend largely on the particular circumstances.<sup>188</sup>

\$4,000. *Whitcofsky v. Weir*, 32 Fed. 307.

\$4,700. *Central R. R. v. DeBray*, 71 Ga. 406.

\$6,000, right hand. *Crosby v. Cuba R. R.*, 158 Fed. 144.

\$7,500. *Sprague v. Atlee*, 81 Ia. 1, 46 N. W. 756.

\$8,500, right hand. *Glucina v. F. H. Goss Brick Co.*, 63 Wash. 401, 115 Pac. 843.

\$10,000, left hand. *Deegan v. Gutta Percha & R. M. Co.*, 131 App. Div. 101, 115 N. Y. Supp. 291.

The following have been held excessive:

\$15,000, right hand; reduced to \$10,000. *Missouri, K. & T. Ry. v. Brown* (Tex. Civ. App.), 140 S. W. 1172.

\$10,000 (reduced from \$12,000), *Brown v. Southern Pac. R. R.*, 7 Utah, 288, 26 Pac. 579.

\$8,000, left hand. *Pittsburgh & L. E. Ry. v. Blair*, 11 Ohio Cir. Ct. 579.

\$8,000; reduced to \$6,000. *Murray v. Hudson R. R. R.*, 47 Barb. 196.

<sup>187</sup> \$4,120 was held excessive for loss of part of a hand, and reduced to \$2,000, in *Waggoner v. Sneed* (Tex. Civ. App.), 138 S. W. 219.

<sup>188</sup> In the following cases damages allowed for loss of one or more fingers have been upheld:

\$1,119.25, one finger, others lacerated. *Adams v. Peterman Mfg. Co.*, 47 Wash. 484, 92 Pac. 339.

\$1,500, one finger, hand crushed, permanent impairment of use. *Strong v. Iowa Cent. Ry.*, 94 Ia. 380, 62 N. W. 799.

\$1,500, thumb, great pain, permanent inconvenience and disfigurement. *Ong Chair Co. v. Cook*, 85 Ark. 390, 108 S. W. 203.

\$1,500, little finger, severe pain.

*Rommen v. Empire F. M. Co.* (Wash.), 118 Pac. 924.

\$2,080, tips of four fingers, earning capacity impaired. *Duskey v. Green Lake Shingle Co.*, 51 Wash. 145, 98 Pac. 99.

\$2,300, right thumb, fingers injured, hand weakened. *Whalen v. Chicago, R. I. & P. Ry.*, 75 Ia. 563, 39 N. W. 894.

\$2,750, forefinger of right hand. *San Antonio & A. P. Ry. v. Muecke*, 47 Tex. Civ. App. 380, 105 S. W. 1009.

\$2,947.60, middle finger, hand crippled. *Lund v. Sargent Mfg. Co.*, 158 Mich. 3, 122 N. W. 372.

\$3,000, forefinger and middle finger of right hand, much pain. *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794.

\$3,000, right forefinger. *Finkelstein v. Kramer*, 133 App. Div. 565, 118 N. Y. Supp. 152.

\$3,008, three fingers. *Rood v. Seattle El. Co.*, 55 Wash. 217, 104 Pac. 249.

\$3,250, left thumb and right forefinger. *Bernier v. St. Paul Gaslight Co.*, 91 Minn. 214, 99 N. W. 778.

\$3,300, two fingers of left hand, two others crippled. *Chapman v. Southern Pac. Co.*, 12 Utah, 30, 41 Pac. 551.

\$4,000, little finger, right hand disabled, body bruised, much pain. *Niblock v. Ann Arbor R. R.*, 158 Mich. 582, 123 N. W. 35.

\$4,500, two fingers, strength of hand and arm impaired, plaintiff a musician. *Oborn v. Nelson*, 126 S. W. 178 (Mo. App.)

\$5,000, three fingers, burns. *Walker v. Simmons Mfg. Co.*, 131 Wis. 542, 111 N. W. 694.

\$6,000, three fingers, operation required, wrist stiffened. *Murtaugh v. New York C. & H. R. R.*, 49 Hun, 456, 3 N. Y. Supp. 483.

\$7,250, several fingers, loss of use of

### § 1358. Disfigurement.

Permanent disfigurement is sometimes an element in damages, either increasing the damages <sup>189</sup> or sometimes because it

hand, permanent incapacity. *Ft. Worth & R. G. Ry. v. Bowen* (Tex. Civ. App.), 68 S. W. 700.

\$7,500, two fingers, scar on palm, permanent nervousness. *Johnson v. Bay City*, 164 Mich. 251, 129 N. W. 29.

\$7,500, all fingers of right hand. *Missouri, K. & T. Ry. v. Hauer* (Tex. Civ. App.), 33 S. W. 1010.

\$9,000 (reduced from \$12,000), four fingers. *Phippin v. Missouri Pac. Ry.*, 196 Mo. 321, 93 S. W. 410.

\$12,000, two fingers, hand disabled, pain. *San Antonio & A. P. Ry. v. Beauchamp*, 54 Tex. Civ. App. 123, 116 S. W. 1163.

\$15,000, one finger right hand, all fingers of left, plaintiff trained in music. *Murray v. Chicago, R. I. & P. Ry. (Ia.)*, 133 S. W. 123.

In the following cases the verdict was held excessive:

\$15,000, one finger, burns, temporary crippling; reduced to \$7,500. *Cutler v. Pittsburg S. P. G. M. Co. (Nev.)*, 116 Pac. 418.

\$7,500, four fingers of right hand; reduced to \$5,000. *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161.

\$6,500, right thumb and left forefinger. *Gray-Meek P. B. Co. v. McNally (Ky.)*, 129 S. W. 299.

\$6,500, thumb and forefinger. *Kansas Pac. Ry. v. Peavey*, 29 Kan. 169, 34 Kan. 472, 8 Pac. 780.

\$5,125, three fingers; reduced to \$4,000. *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45.

\$5,000 two fingers. *Louisville & N. R. v. Foley*, 94 Ky. 220, 21 S. W. 866.

\$5,000, thumb and one finger of left hand, hand crippled; reduced to \$4,000. *Richardson v. St. Louis & H. Ry.*, 223 Mo. 325, 123 S. W. 22.

\$5,000, two fingers. *Barclay v. Puget S. L. Co.*, 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140.

\$4,500, right forefinger and part of thumb; reduced to \$3,500. *Rittel v. E. E. Souther Iron Co.*, 127 Mo. App. 463, 105 S. W. 662.

\$4,000, little finger, hand stiffened, pain; reduced to \$3,000. *Mahood v. Pleasant Valley Coal Co.*, 8 Utah, 85, 30 Pac. 149.

\$4,000, two fingers; reduced to \$3,000. *Gagnon v. Klauder-Weldon D. M. Co.*, 174 Fed. 477.

\$3,500 (reduced from \$4,500), two fingers; reduced to \$2,500. *Stiller v. Bohn Manuf. Co.*, 80 Minn. 1, 82 N. W. 981.

\$2,500, one finger; reduced to \$1,000. *Ball v. Peterman Mfg. Co.*, 47 Wash. 653, 92 Pac. 425.

\$2,000, thumb. *Louisville & N. R. v. Law*, 14 Ky. L. Rep. 850, 21 S. W. 648.

\$1,800 two fingers; reduced to \$1,200. *Gahagan v. Aerometer Co.*, 67 Minn. 252, 69 N. W. 914.

\$1,250, one joint of right thumb. *N. N. & N. V. Co. v. Walker*, 14 Ky. L. Rep. 175.

<sup>189</sup> The following verdicts have been upheld:

\$600 for pain and scar. *The North Star*, 169 Fed. 711.

\$1,000 for pain, expense, and disfigured face. *Frankfort v. Kendrick (Ky.)*, 114 S. W. 289.

\$1,200 (reduced from \$1,600), for pain, loss of time, and permanent scars. *O'Callaghan v. Dellwood Park Co.*, 149 Ill. App. 34.

\$1,500 for pain, expenses, and scarred face, by girl of eighteen. *Cameron v. Bryan*, 89 Ia. 214, 56 N. W. 434.

\$3,000 for pain, loss of taste and

furnishes of itself the principal ground for the recovery of damages.<sup>190</sup>

### § 1359. Impairment of sight or hearing.

Verdicts have been examined by the courts which gave compensation for the impairment of sight,<sup>191</sup> for the entire loss

smell, and distorted face. *Illinois Valley Ry. v. Haremski*, 132 Ill. App. 423.

\$3,000 for permanent lameness and distorted face. *Juul v. Kitsap Transp. Co.*, 55 Wash. 156, 104 Pac. 191.

\$3,500 for pain, nervous irritation, and disfigurement. *Frank Parmelee Co. v. Wheelock*, 127 Ill. App. 500.

\$3,500 (reduced from \$4,500), for pain and disfigurement of face. *Pronskévitch v. Chicago & A. Ry.*, 232 Ill. 136, 83 N. E. 545, affirming 135 Ill. App. 401.

\$4,000 for permanent pain and disfigurement of face. *Shortridge v. Scarritt Estate Co.* (Mo. App.), 130 S. W. 126.

\$4,500 for pain, loss of time ten months, expense, and permanent disfigurement. *The J. G. Lindauer*, 158 Fed. 449.

\$5,000 for bodily and mental pain, permanent disability, and disfigurement. *Gurdon & Ft. S. Ry. v. Calhoun*, 86 Ark. 76, 109 S. W. 1017.

\$5,000 for permanent injury and disfigurement. *St. Louis, I. M. & S. R. R. v. Price*, 83 Ark. 437, 104 S. W. 157.

\$6,000 for broken ribs and permanent disfigurement of face, of young girl eight years old. *Bennett v. Brooklyn Heights R. R.*, 1 App. Div. 205, 37 N. Y. Supp. 447.

\$7,000 for suffering and permanent disfigurement of girl sixteen years old. *St. Louis, S. F. & T. Ry. v. Andrews*, 44 Tex. Civ. App. 426, 99 S. W. 871.

\$15,000 for injury requiring serious surgical treatment of face, permanent lameness, and disfigurement of girl thirteen years old. *James v. Oakland Trac. Co.*, 9 Cal. App. 21, 103 Pac. 1082.

\$16,338.82 for frightful and permanent injury and disfigurement of a woman. *Kenney v. South Shore N. G. & F. Co.*, 131 App. Div. 859, 119 N. Y. Supp. 363.

For injury to brain, permanent injury to health, and deforming scars of young girl, a verdict of \$30,000 was reduced to \$12,000. *Mitchell v. Tacoma R. & M. Co.*, 13 Wash. 560, 43 Pac. 528.

<sup>190</sup> *Newbury v. Getchel & M. L. & M. Co.*, 100 Ia. 441, 457, 69 N. W. 743, 62 Am. St. Rep. 582.

The following verdicts were upheld where the principal damage was permanent deformity:

\$700. *Gibbs v. Poplar Bluff L. & P. Co.* (Mo. App.), 125 S. W. 840.

\$1,500. *Cameron v. Bryan*, 89 Ia. 214, 56 N. W. 434.

\$2,000. *Chicago v. Reid*, 141 Ill. App. 514.

The following verdict was held excessive:

\$7,000; reduced to \$3,000. *Kilmer v. Reckitt*, 75 App. Div. 180, 77 N. Y. Supp. 395.

<sup>191</sup> For impairment of sight the following verdicts have been upheld:

\$750. *Lemoine v. Sullivan* (Ark.), 134 S. W. 946.

\$2,500, also impairment of hearing. *Galveston, H. & S. A. Ry. v. Bean*, 45 Tex. Civ. App. 52, 99 S. W. 721.

\$3,000. *Galveston, H. & S. A. Ry. v. Sanchez* (Tex. Civ. App.), 122 S. W. 44.

\$5,000, incapacitated for business. *Missouri, K. & T. Ry. v. Huff* (Tex. Civ. App.), 32 S. W. 551.

\$6,500, scalded all over body, intense pain. *Winona Technical Institute v. Stolte*, 173 Ind. 39, 89 N. E. 393.

\$9,000, fracture of leg, wrists, and

of sight in one eye,<sup>192</sup> usually accompanied by impairment of the sight of the other eye;<sup>193</sup> and recovery for total blind-

skull, leg and wrist permanently deformed. *Welk v. Jackson Architectural Ironworks*, 98 App. Div. 247, 90 N. Y. Supp. 541.

The following verdicts have been held excessive:

\$10,000, burned and scarred, no permanent injury. *Kentucky Wagon Mfg. Co. v. Shake*, 137 Ky. 742, 126 S. W. 1095.

\$8,000; reduced to \$7,000. *De La Vergne R. M. Co. v. Stahl*, 24 Tex. Civ. App. 471, 60 S. W. 319.

\$4,650; reduced to \$2,500. *McGrew v. Chicago & M. E. R. R.*, 142 Ill. App. 210.

<sup>192</sup> For loss of an eye the following verdicts have been upheld:

\$2,500. *Orscheln v. Scott*, 106 Mo. App. 583, 80 S. W. 982.

\$3,682. *Potvin v. West Bay City Shipbuilding Co.*, 156 Mich. 201, 120 N. W. 613.

\$4,400. *Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

\$4,500. *Shaver v. J. Neils Lumber Co.*, 109 Minn. 376, 123 N. W. 1076.

\$5,000. *Texas & P. Ry. v. Bowlin* (Tex. Civ. App.), 32 S. W. 918.

\$5,000; pain and operation. *Hocking v. Windsor Spring Co.*, 131 Wis. 532, 111 N. W. 685.

\$6,000, disabling injury to head. *Starnes v. Pine Woods Lumber Co.*, 122 La. 284, 47 So. 607.

\$6,500. *Dallas & G. Ry. v. Abler*, 72 Tex. 150, 9 S. W. 871.

\$7,000. *Shaw v. Chicago & G. T. Ry.*, 123 Mich. 629, 82 N. W. 618, 49 L. R. A. 308.

\$7,500. *Korzib v. Netherlands-American S. N. Co.*, 175 Fed. 998.

\$10,000, skull crushed, inability to labor from effects of injury. *Missouri, K. & T. Ry. v. Parker*, 20 Tex. Civ. App. 470, 49 S. W. 717.

\$11,400, skull fractured, mental and physical wreck. *Cobb v. St. Louis & H. Ry.*, 149 Mo. 609, 50 S. W. 894.

The following verdicts were held excessive:

\$15,000, badly burned; reduced to \$10,000. *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 48 L. R. A. 649.

\$12,821, disfigurement of face; reduced to \$7,500. *Haynes v. Maine Cent. R. R.*, (Me.), 80 Atl. 38.

<sup>193</sup> For loss of one eye and impairment of the sight of the other the following verdicts have been upheld:

\$1,000 (reduced from \$6,200). *Nelson v. A. H. Stange Co.*, 140 Wis. 657, 123 N. W. 152.

\$7,000, incapacitated for business. *Chicago Veneer Co. v. Jones* (Ky.), 135 S. W. 430.

\$7,948, other serious injuries. *Haley v. Solvay Process Co.*, 127 App. Div. 753, 112 N. Y. Supp. 25.

\$8,500, bones of face and skull injured, operation. *Wysocki v. Wisconsin Lakes I. & C. Co.*, 121 Wis. 96, 98 N. W. 950.

\$14,400. *Vant Hul v. Great Northern Ry.*, 90 Minn. 329, 96 N. W. 789.

\$25,000, side paralyzed, spine curved, other injuries. *Perkins v. Sunset T. & T. Co.*, 155 Cal. 712, 103 Pac. 190.

\$30,000, severely burned, scars, arm stiffened, several operations, total disability. *Commonwealth Electric Co. v. Rooney*, 138 Ill. App. 275.

A verdict of \$15,000 where there were severe burns, causing loss of time, but completely cured, was held excessive and reduced to \$12,000; there having been a former verdict of \$8,000. *Hardy v. Chicago, R. I. & P. Ry.*, 149 Ia. 41, 127 N. W. 1093.

ness has also been brought in question.<sup>194</sup> So the courts have considered the question of excessive damages for total deafness<sup>195</sup> and for an impairment of hearing.<sup>196</sup>

### § 1360. Nervous disorders.

Where the injury causes some sort of nervous disorder, the amount of recovery may be greatly increased thereby; though juries appear often to be misled by the indefinite and intangible nature of the disease to giving verdicts which courts regard as excessive. Courts have been called upon to pass on the excessiveness of numerous verdicts in which compensation had been assessed for neurasthenia, nervous prostration, or traumatic neurosis,<sup>197</sup> or for nervous shock, hysteria, and many other forms of nervous disorder.<sup>198</sup>

<sup>194</sup> For total blindness the following verdicts have been held excessive:

\$37,500. *Deep Mining & Drainage Co. v. Fitzgerald*, 21 Colo. 533, 43 Pac. 210.

\$9,500; reduced to \$8,000. *Peterson v. Roessler & Hasslacher Chemical Co.*, 131 Fed. 156.

<sup>195</sup> For deafness the following verdicts have been upheld:

\$1,000. *American E. & C. Co. v. Crawford* (Ky.), 134 S. W. 448.

\$2,500. *West Chicago St. R. R. v. Lups*, 74 Ill. App. 420.

\$7,500, eyesight weakened, wound at base of skull. *Ronald v. Pacific Traction Co.* (Wash.), 118 Pac. 311.

For deafness which prevented plaintiff, an engineer, from continuing in his business, a verdict of \$25,000 reduced to \$15,000 by the trial court, was held so excessive as to bear on its face the evidence of an error which remittitur could not cure, and it was set aside. *Chicago, R. I. & G. Ry. v. Forrester* (Tex. Civ. App.), 137 S. W. 162.

<sup>196</sup> For impairment of hearing the following verdicts have been upheld:

\$2,500, four teeth lost. *Wilson v. Chicago City Ry.*, 144 Ill. App. 604.

\$4,000 (reduced from \$5,000), sight and memory impaired. *Kennedy v. Chicago, M. & St. P. Ry.*, 57 Minn. 227, 58 N. W. 878.

\$5,900. *Southwestern T. & T. Co. v. Abeles*, 94 Ark. 254, 126 S. W. 724.

<sup>197</sup> For neurasthenia or similar nervous disease caused by the defendant the following verdicts have been upheld:

\$2,500 (reduced from \$6,448). *Murphy v. South St. Paul*, 101 Minn. 341, 112 N. W. 259.

\$3,000. *Louisville v. Tompkins* (Ky.), 122 S. W. 174.

\$4,000. *Roe v. Metropolitan St. Ry.*, 131 Mo. App. 128, 110 S. W. 611.

\$4,000. *Garthley v. Seattle Electric Co.*, 49 Wash. 616, 96 Pac. 155.

\$5,000. *Berger v. St. Paul City Ry.*, 95 Minn. 84, 103 N. W. 724.

\$5,000 (reduced from \$8,500). *Fall-*

<sup>198</sup> For nervous shock, hysteria, or other nervous disorder resulting from

defendant's wrong, the following verdicts have been upheld:



### § 1361. Insanity and loss of mental power.

Verdicts have been considered where the principal element

*din v. Seattle*, 57 Wash. 307, 106 Pac. 914.

\$7,000. *Missouri, K. & T. Ry. v. Farris* (Tex. Civ. App.), 126 S. W. 1174.

\$8,000. *Pierce v. Spokane*, 59 Wash. 615, 110 Pac. 537.

\$9,500, internal injuries, paralysis. *Crozier v. Minneapolis St. Ry.*, 106 Minn. 77, 118 N. W. 256.

\$16,000, severe attack, danger of dementia or paresis. *St. Louis, I. M. & S. R. R. v. Osborne*, 95 Ark. 310, 129 S. W. 537.

The following verdicts were held excessive:

\$34,000, mind impaired, partial and progressive paralysis, lungs injured; reduced to \$27,500. *Missouri, K. & T. Ry. v. Dalton* (Tex. Civ. App.), 120 S. W. 240.

\$18,000. *Chlanda v. St. Louis Transit Co.*, 213 Mo. 244, 112 S. W. 249.

\$13,000; reduced to \$8,000. *Chicago,*

*R. I. & G. Ry. v. Swann* (Tex. Civ. App.), 127 S. W. 1164.

\$12,000; reduced to \$8,000. *Schwartzbauer v. Great Northern Ry.*, 112 Minn. 356, 128 N. W. 286.

\$10,000; reduced to \$4,000. *Becker v. Albany Ry.*, 35 App. Div. 46, 54 N. Y. Supp. 395.

\$10,000; reduced to \$4,000. *Lockwood v. Twenty-third St. Ry.*, 15 Daly, 374, 7 N. Y. Supp. 633.

\$5,500. *Edwards v. Seattle R. & S. Ry.*, 62 Wash. 77, 113 Pac. 563.

\$5,000; reduced to \$3,000. *O'Flanagan v. Missouri Pac. Ry.* (Mo. App.), 129 S. W. 1019.

\$4,500; reduced to \$3,500. *De Courcy v. Prendergast Const. Co.*, 140 Mo. App. 169, 120 S. W. 632.

\$3,000, also diseased heart, injury to eye and spine. *Gay v. Milwaukee E. R. & L. Co.*, 138 Wis. 348, 120 N. W. 283.

(Note 198—continued.)

\$800. *Robinson v. Marino*, 3 Wash. 434, 441, 28 Pac. 752, 28 Am. St. Rep. 50.

\$800 (reduced from \$1,500). *Pfeiffer v. Radke*, 144 Wis. 430, 129 N. W. 413.

\$1,000. *Indianapolis T. T. Co. v. Ulrick*, 45 Ind. App. 149, 90 N. E. 321.

\$1,000. *Lang v. Hill*, 151 Mo. App. 685, 138 S. W. 698.

\$1,135.45. *Des Moines v. New York City Ry.*, 118 App. Div. 848, 103 N. Y. Supp. 618.

\$2,500. *Averitt v. Metropolitan St. Ry.*, 151 Mo. App. 265, 131 S. W. 752.

\$3,750. *Colorado Springs Electric Co. v. Soper*, 38 Colo. 126, 88 Pac. 165.

\$4,000. *Wyman v. Pike*, 108 Minn. 481, 122 N. W. 310.

\$4,000. *Kupke v. St. Louis Tr. Co.*, 122 Mo. App. 355, 99 S. W. 472.

\$6,400. *Kimic v. San Jose-Los Gatos I. U. Ry.*, 156 Cal. 273, 379, 104 Pac. 312.

\$6,500. *Olson v. Great Northern Ry.*, 68 Minn. 155, 71 N. W. 5.

\$9,000 (reduced from \$12,500). *Lake St. Elevated R. R. v. Sandy*, 137 Ill. App. 244.

\$10,000, heart diseased, disabled from work. *Galveston, H. & S. A. Ry. v. Worth*, 55 Tex. Civ. App. 478, 116 S. W. 365.

\$11,500. *Savage v. Joseph H. Bauland Co.*, 42 App. Div. 285, 58 N. Y. Supp. 1014.

The following verdicts were held excessive:

\$30,000. *Gibney v. St. Louis Transit Co.*, 204 Mo. 704, 103 S. W. 43.

\$26,000. *Louisville & N. R. R. v. Long*, 94 Ky. 410, 22 S. W. 747.

\$20,000 (reduced from \$30,000). *Partello v. Missouri Pac. Ry.*, 217 Mo. 645, 117 S. W. 1138.

\$20,000; reduced to \$7,500. *Hamilton v. Great Falls St. Ry.*, 17 Mont. 334, 42 Pac. 860.

of loss was insanity supervening upon the injury,<sup>199</sup> or idiocy,<sup>200</sup> or at least a permanent loss of mental power, or other mental trouble.<sup>201</sup>

### § 1362. Shortening of life.

The fact that a physical injury will appreciably shorten the victim's life, either by resulting in a fatal disease<sup>202</sup> or by the general debilitating effect,<sup>203</sup> justifies heavy damages. In *Clay v. Chicago, Milwaukee and St. Paul Railway*<sup>204</sup> a verdict of \$35,000 was given for very severe and painful injuries which resulted, after suit brought but before verdict, in plaintiff's death. The verdict was upheld. It was urged that no greater damages could be recovered than would be allowed for death;

\$12,000. *Davidson v. St. Louis Transit Co.*, 211 Mo. 320, 109 S. W. 583.

\$7,500; reduced to \$5,000. *Lapleigne v. Morgan's L. & T. R. & S. S. Co.*, 40 La. Ann. 661, 4 So. 875.

\$4,500; reduced to \$2,500. *Hase v. Seattle (Wash.)*, 107 Pac. 515.

<sup>199</sup> The following verdicts, where the injury resulted in insanity, were upheld:

\$6,000. *Anderson v. Smith*, 104 Minn. 40, 115 N. W. 743.

\$10,000. *Bochat v. Knisely*, 144 Ill. App. 551.

\$12,000. *Cherbuliez v. Parsons*, 59 Misc. 613, 111 N. Y. Supp. 516.

<sup>200</sup> The following verdicts were upheld where the plaintiff entirely lost his mental power as a result of the injury:

\$3,600. *Chicago U. Tract. Co. v. Scanlon*, 136 Ill. App. 212.

\$8,500. *Wihnyk v. Second Ave. R. R.*, 14 App. Div. 515, 43 N. Y. Supp. 1023.

\$10,000. *International & G. N. R. R. v. Dalwigh (Tex. Civ. App.)*, 56 S. W. 136.

\$18,962.88. *Alamo D. B. Co. v. Yeargan (Tex. Civ. App.)*, 123 S. W. 721.

<sup>201</sup> The following verdicts were upheld:

\$6,000 for permanent impairment of mental faculties. *Powell v. Nevada C. & O. Ry.*, 28 Nev. 40, 78 Pac. 978.

\$7,000 for injury resulting in incurable epileptic convulsions. *Romona O. S. Co. v. Shields*, 173 Ind. 68, 88 N. E. 595.

<sup>202</sup> The following verdicts have been upheld where a fatal disease was caused by the injury:

\$3,000, tuberculosis. *Paaauhau Sugar Plantation Co. v. Palapala*, 127 Fed. 920, 62 C. C. A. 552.

\$3,400, disease of heart. *Montgomery Tr. Co. v. Bozeman*, 152 Ala. 145, 44 So. 559.

\$4,500, tuberculosis. *Van Cleve v. St. Louis, M. & S. E. Ry.*, 137 Mo. App. 332, 118 S. W. 116.

\$7,500, cancer. *Louisville Ry. v. Steubing (Ky.)*, 136 S. W. 634.

\$15,000, progressive paralysis. *San Antonio Traction Co. v. Probandt (Tex. Civ. App.)*, 125 S. W. 931.

<sup>203</sup> The following verdicts have been upheld:

\$2,500. *Yazoo & M. V. R. R. v. Beattie (Miss.)*, 49 So. 609.

\$8,800. *Cooper v. St. Paul City Ry.*, 54 Minn. 379, 56 N. W. 42.

\$13,625. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273.

<sup>204</sup> 104 Minn. 1, 115 N. W. 949.

and these were restricted by law to \$5,000. Mr. Justice Jagard, however, held that, the amount of damages not being restricted in this action, the limit fixed by law for damages for death had no relation to the amount recoverable. He said:

"There is no dispute that plaintiff's injuries resulted in indescribable anguish and in death. They were as serious as they could possibly have been. That they were necessarily fatal, or that only \$5,000 could have been recovered by his administrator for the next of kin, does not constitute any reason whatever for holding the verdict improper. It has never been the law in this court that, the worse a servant is hurt by his master's negligence, the less he can recover. The fact that death was likely to result does not diminish the extent of the proper recovery. Plaintiff, surviving the casualty, had a cause of action totally different from that of his administrator on his death. For his injury he was entitled to compensation. The greater the injury, the larger should the verdict be. In the present case, calculations of the value of the verdict in money, intelligently invested, show that the verdict was not unreasonable upon a strictly pecuniary basis."

### § 1363. Other permanent injuries.

Verdicts for other permanent personal injuries in great variety have been considered by the courts, and the verdicts seem to have been usually upheld.<sup>205</sup>

<sup>205</sup> In the following cases verdicts for permanent injuries have been upheld:

\$500, permanent and serious injury to arm. *Henderson v. White*, 49 S. W. 764, 20 Ky. L. Rep. 1525.

\$500, miscarriage. *Big Sandy & C. R. R. v. Blankenship* (Ky.), 118 S. W. 316, 23 L. R. A. (N. S.) 345.

\$900 (reduced from \$2,000), permanent injury to arm, continued pain. *Rock Island v. Larkin*, 136 Ill. App. 579.

\$900, internal injuries, causing permanent weakness. *Monongahela R. C. C. & C. Co. v. Kramer* (Ky.), 121 S. W. 978.

\$1,000, sight and hearing impaired,

disability to do housework. *State v. Miller*, 180 Fed. 796.

\$1,000, miscarriage, permanent suffering and mortification. *Singer S. M. Co. v. Phipps* (Ind. App.), 94 N. E. 793, 32 Ky. L. Rep. 431.

\$1,000, health permanently impaired. *University of Louisville v. Hammock*, 127 Ky. 564, 106 S. W. 219, 14 L. R. A. (N. S.) 784.

\$1,000, baby contracted blood poisoning and catarrhal pneumonia, permanently injuring health. *Covington v. Bollwinkle* (Ky.), 121 S. W. 664.

\$1,500, impaired hearing, great pain, inability to do heavy work. *St. Louis,*

### § 1364. Doubt as to permanence of injury.

A doubt as to the permanence of the injury may exist in the

*I. M. & S. Ry. v. Reed*, 92 Ark. 350, 122 S. W. 645.

\$1,500, spine injured, partial paralysis. *Witty v. Springfield Traction Co.* (Mo. App.), 134 S. W. 82.

\$1,500, injury to liver and spine. *Ferguson v. Ehret*, 14 Misc. 454, 35 N. Y. Supp. 1020.

\$1,500, permanent dizziness and headache. *Missouri, K. & T. Ry. v. Allen*, 53 Tex. Civ. App. 433, 115 S. W. 1179.

\$1,600, injury to leg, hip and back, continued bad health with headaches. *Western S. C. & F. Co. v. Bean*, 163 Ala. 255, 50 So. 1012.

\$2,000, bruises, curvature of spine, wasting of muscles, drooping of shoulder. *Hanchett v. Haas*, 125 Ill. App. 111.

\$2,000, burns leaving scars, legs permanently weakened. *Asmossen v. Swift & Co.*, 148 Ill. App. 248.

\$2,000, permanent scar on leg, probability of varicose ulcerations. *Bayles v. Savery Hotel Co.* (Ia.), 126 N. W. 808.

\$2,000, lower part of body injured, no control over organs. *Louisville Ry. v. Bohon*, 99 S. W. 915, 30 Ky. L. Rep. 862.

\$2,000, permanent injury, confined to bed ten months. *Louisville & N. R. Ry. v. MacMillan* (Ky.), 134 S. W. 185.

\$2,000, incurable affection of spine, permanent suffering. *Waldron v. St. Paul*, 33 Minn. 87, 22 N. W. 4.

\$2,000, woman, constant hemorrhages of stomach. *Newbury v. Great Northern Ry.*, 109 Minn. 113, 122 N. W. 1117.

\$2,000, severe case of varicocele. *McNamara v. Metropolitan St. Ry.*, 133 Mo. App. 645, 114 S. W. 50.

\$2,000, internal injuries and nervous disability. *O'Donnell v. Hannibal* (Mo. App.), 128 S. W. 819.

\$2,000, permanent injury to spine. *Wohlenberg v. Melchert*, 35 Neb. 803, 53 N. W. 982.

\$2,250, internal injuries. *St. Louis S. W. Ry. v. Freedman*, 18 Tex. Civ. App. 553, 46 S. W. 101.

\$2,250. *Smalley v. Appleton*, 75 Wis. 18, 43 N. W. 826.

\$2,500, varicose veins, internal injuries and indigestion. *Krisinger v. Creston*, 141 Ia. 154, 119 N. W. 526.

\$2,500, internal injuries, continued bad health. *Louisville H. & S. L. Ry. v. Foulks*, 103 S. W. 266, 31 Ky. L. Rep. 632.

\$2,500, diseased lung. *Donelly v. St. Paul City Ry.*, 70 Minn. 278, 73 N. W. 157.

\$2,750, neuralgia, permanent weak side. *Fulmore v. St. Paul City Ry.*, 72 Minn. 448, 75 N. W. 589.

\$3,200, tumor, adhesion of lung to chest. *Wynne v. Atlantic Ave. R. R.*, 14 Misc. 394, 35 N. Y. Supp. 1034.

\$3,500, nervous shock, internal injuries, impairment of health. *Watkiss v. Chicago*, 146 Ill. App. 562.

\$3,500, hemorrhages, loss of control of functions. *Louisville Ry. v. Worley*, 101 S. W. 926, 31 Ky. L. Rep. 96.

\$3,500, permanent injury to spine. *Morris v. New York, O. & W. Ry.*, 73 Hun, 560, 26 N. Y. Supp. 342.

\$3,500, leg lengthened, permanent injury to nervous system. *Willis v. Second Ave. Traction Co.*, 189 Pa. 430, 42 Atl. 1.

\$4,000, permanent injury to health. *Indiana U. T. Co. v. Ohue*, 45 Ind. App. 632, 89 N. E. 507.

\$4,000, permanent paralysis of shoulder muscle and curvature of spine. *Degnan v. Brooklyn City R. R.*, 14 Misc. 388, 35 N. Y. Supp. 1047.

\$4,300, internal injuries, nervousness, palpitation of heart. *Cunningham v.*

minds of the judges who have to pass on the question of excessiveness. If the verdict is moderate, this doubt will not

Neal, 49 Tex. Civ. App. 613, 109 S. W. 455.

\$4,500, chronic invalid, hernia. Chicago v. Saldman, 129 Ill. App. 282, affirmed 225 Ill. 625, 80 N. E. 349.

\$5,000, deaf, rupture, prematurely old. Chicago Union Tr. Co. v. Lowenrosen, 125 Ill. App. 194, affirmed 222 Ill. 506, 78 N. E. 813.

\$5,000, tuberculous foot, lameness. Mattoon City Ry. v. Graham, 138 Ill. App. 70, affirmed Graham v. M. City Ry., 234 Ill. 483, 84 N. E. 1070.

\$5,000, hernia, internal injury. Louisville, H. & St. L. Ry. v. Kessie, 103 S. W. 261, 31 Ky. L. Rep. 617.

\$5,000. Southern Ry. v. Brewer, 105 S. W. 160, 32 Ky. L. Rep. 43.

\$5,000, internal injuries, health permanently impaired. Louisville, H. & St. L. Ry. v. Armstrong (Ky.), 125 S. W. 276.

\$5,000, internal injuries. Price v. Metropolitan St. Ry., 220 Mo. 435, 119 S. W. 932.

\$5,000, stiff neck, constant pain, chin partially paralyzed. Commercial Tel. Co. v. Davis, 43 Tex. Civ. App. 547, 96 S. W. 939.

\$5,000, bruises, failing health, pain, inability to work. Texas & G. Ry. v. Hall (Tex. Civ. App.), 125 S. W. 71.

\$5,000, constant suffering and interference with work. Bitner v. Utah Cent. Ry., 4 Utah, 502, 11 Pac. 620.

\$5,000, permanent injury, femoral hernia. Hodd v. Tacoma, 45 Wash. 436, 88 Pac. 842.

\$6,000, permanent invalid, lame, nervous disorders. Westervelt v. St. Louis Transit Co., 222 Mo. 325, 121 S. W. 114.

\$6,500, inflammation of sciatic nerve, atrophy of adjacent parts, never well. Louisville Ry. v. Owens, 97 S. W. 356, 29 Ky. L. Rep. 1294.

\$7,500, partial paralysis, functional

derangement, helpless condition, increasing disability. Cumberland T. & T. Co. v. Overfield, 127 Ky. 548, 106 S. W. 245.

\$7,500, skull crushed, mind affected, pain, continual headache, and disability. Beave v. St. Louis Transit Co., 212 Mo. 331, 111 S. W. 52.

\$7,500, dislocation of spine, injury progressive. Missouri, K. & T. Ry. v. Stone (Tex. Civ. App.), 125 S. W. 587.

\$8,000, partial paralysis, excruciating pain. Stomne v. Hanford Produce Co., 108 Ia. 137, 78 N. W. 848.

\$8,000, face crushed, jaw stiffened, imperfect nutrition, invalid for life. Oties v. Cowles E. S. & A. Co., 54 Hun, 635, 7 N. Y. Supp. 251.

\$8,000, physical wreck, partially paralyzed, impaired vision, total incapacity. San Antonio & A. P. Ry. v. Long (Tex. Civ. App.), 28 S. W. 214.

\$8,000, spine affected, causing stiffness, aggravating prior hernia. Galveston, H. & S. A. Ry. v. Coker (Tex. Civ. App.), 135 S. W. 179.

\$8,500, rupture, bowel trouble, ataxia, hemianesthesia, and chronic peritonitis, permanently impaired health. Klein v. Atchison, T. & S. F. Ry., 10 Cal. App. 19, 107 Pac. 147.

\$10,000, miscarriage, eyesight and action of heart impaired. Howland v. Oakland C. S. Ry., 110 Cal. 513, 42 Pac. 983.

\$10,000, permanent internal and spinal troubles. Barr v. City of Kansas, 121 Mo. 22, 25 S. W. 562.

\$11,000, serious irreducible rupture. Chicago v. Gillett, 91 Ill. App. 287.

\$11,000, permanent invalid. Chicago v. Didier, 131 Ill. App. 406, affirmed Chicago v. Ogden Sheldon & Co., 227 Ill. 595, 81 N. E. 698.

\$20,000, arm and shoulder injured, bones of head and shoulder diseased, brain weakened, sight and hearing im-

cause the court to set the verdict aside; in fact, the reasonable possibility of permanent consequences might even enhance the amount of a verdict.<sup>206</sup> But if the amount of the verdict is such that it could be justified only if the injury were permanent, and serious doubt is felt as to the fact of permanence, this doubt may be considered in passing upon the excessiveness of the verdict.<sup>207</sup>

paired, jawbone broken, epilepsy and death likely to follow. *Sabine & E. T. Ry. v. Ewing*, 7 Tex. Civ. App. 8, 26 S. W. 638.

\$25,000, man of thirty-nine, intermittently suffers from pain in head, sleeps poorly, right side partially paralyzed, his voice useless, injuries probably permanent and will ultimately cause death. *St. John v. Northern Pac. Ry.* (Mont.), 111 Pac. 632.

The following verdicts were held excessive:

\$30,000, paralysis of lower part of body, no control over functions. *McKenzie v. North Coast Coll. Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244.

\$25,000; reduced to \$15,000. *De Warden v. Metropolitan St. Ry.*, 1 App. Div. 240, 37 N. Y. Supp. 133.

\$15,000, permanent injury to leg; reduced to \$8,000. *Chapman v. Atlantic Ave. R. R.*, 14 Misc. 384, 35 N. Y. Supp. 1045.

\$10,000, deformity of foot not seriously interfering with use; reduced to \$5,000. *Chicago, R. I. & G. Ry. v. Swan* (Tex. Civ. App.), 130 S. W. 855.

<sup>206</sup> Where a serious injury may be permanent, the following verdicts have been upheld:

\$400. *Weber v. Creston*, 75 Ia. 16, 39 N. W. 126.

\$750. *Jackson v. St. Paul City Ry.*, 74 Minn. 48, 76 N. W. 956.

\$1,350. *Young v. O'Brien*, 36 Wash. 570, 79 Pac. 211.

\$1,750. *Carlson v. Great Northern Ry.*, 106 Minn. 254, 118 N. W. 832.

\$2,000. *Whiting v. Eagan*, 189 N. Y. 587, 83 N. E. 1016.

\$2,500. *Calumet E. S. Ry. v. Jennings*, 83 Ill. App. 616.

\$3,000. *Curtis v. Barber Asphalt Paving Co.*, 44 Wash. 334, 87 Pac. 345.

\$3,000 (reduced from \$4,000). *Grisson v. Hofius*, 39 Wash. 51, 80 Pac. 1002.

\$4,000. *The Little Silver*, 189 Fed. 980.

\$4,000. *Bryant v. Omaha & C. B. R. & B. Co.*, 98 Ia. 483, 67 N. W. 392.

\$4,000. *Covington v. Diehl*, 59 S. W. 492, 22 Ky. L. Rep. 955.

\$6,000. *St. Louis S. W. Ry. v. Gresham* (Tex. Civ. App.), 140 S. W. 483.

\$6,300. *St. Louis & S. F. R. R. v. Richards*, 23 Okla. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032.

\$9,000, tuberculosis which may be cured. *Roenebeck v. Brooklyn Heights R. R.*, 123 App. Div. 606, 108 N. Y. Supp. 80.

\$10,000. *Missouri, K. & T. Ry. v. Cook*, 12 Tex. Civ. App. 203, 33 S. W. 669.

<sup>207</sup> In the following cases the verdict was held excessive on account of doubts as to the permanence of the injury:

\$15,000. *Stevens v. New Jersey & H. R. Ry.*, 74 N. J. L. 237, 65 Atl. 874.

\$12,500; reduced to \$8,000. *Morrison v. Northern Pac. Ry.*, 34 Wash. 70, 74 Pac. 1064.

\$10,500. *Illinois Cent. R. R. v. Houchins*, 89 S. W. 530, 28 Ky. L. Rep. 499, 1 L. R. A. (N. S.) 375.

\$10,000. *Louisville Southern R. R.*

### § 1365. Loss of service.

The estimation of the value of services lost contains many elements of uncertainty, and the jury has therefore great latitude in finding a pecuniary equivalent. This is especially true in the case of loss of service of a wife, where there can be no possible pecuniary test of the value of consortium and affection. Large verdicts have therefore been allowed to stand in such cases.<sup>208</sup> For loss of service of a minor child the possible range of compensation is not so great.<sup>209</sup>

*v. Minogue*, 14 S. W. 357, 12 Ky. L. Rep. 378.

\$10,000. *Louisville & N. R. R. v. Mattingly*, 38 S. W. 686, 18 Ky. L. Rep. 823.

\$10,000. *Louisville & N. R. R. v. Reaume*, 128 Ky. 90, 107 S. W. 290.

\$9,000. *Covington & C. B. Co. v. Goodnight*, 60 S. W. 415, 22 Ky. L. Rep. 1242.

\$9,000. *Watson v. Brightwell*, 82 S. W. 454, 28 Ky. L. Rep. 887.

\$8,750. *Cincinnati, N. O. & T. P. Ry. v. Richardson* (Ky.), 140 S. W. 648.

\$8,000. *Southern Ry. v. Goodard*, 97 S. W. 392, 30 Ky. L. Rep. 126.

\$7,225. *H. P. Phillips & Co. v. Pruitt*, 82 S. W. 628, 26 Ky. L. Rep. 831.

\$7,000. *Houston & T. C. R. R. v. Bird* (Tex. Civ. App.), 48 S. W. 756.

\$5,000; reduced to \$1,500. *Kansas & T. C. Co. v. Reed*, 1 Ind. Terr. 245, 40 S. W. 898.

\$4,000. *Bucher v. Wisconsin Cent. Ry.*, 139 Wis. 597, 120 N. W. 518.

\$3,500; reduced to \$1,000. *Kedden v. Public Service Ry.* (N. J. L.), 75 Atl. 179.

\$3,100. *Kennedy v. St. Paul City Ry.*, 59 Minn. 45, 60 N. W. 810.

\$2,000. *Belvidere City Ry. v. Bute*, 128 Ill. App. 620.

<sup>208</sup> For loss of service of a wife the following verdicts have been upheld:

\$25, loss of society of wife, who lived only a few hours after the injury.

*Chapman v. Pfarr*, 145 Ia. 196, 132 N. W. 957.

\$500. *State v. Miller*, 180 Fed. 796.

\$600. *El Paso El. Ry. v. Sierra* (Tex. Civ. App.), 109 S. W. 986.

\$700. *The Little Silver*, 189 Fed. 980.

\$1,200. *Birmingham R. L. & P. Co. v. Lavender*, 158 Ala. 434, 47 So. 1026.

\$1,800. *Texas T. & T. Co. v. Scott* (Tex. Civ. App.), 127 S. W. 587.

\$2,500. *Citizens' R. & L. Co. v. Johns*, 52 Tex. Civ. App. 489, 116 S. W. 62.

\$3,000. *Allen v. Manhattan Ry.*, 17 N. Y. Supp. 187, 60 N. Y. Super. Ct. 230.

\$3,500. *Sherman S. & S. Ry. v. Eaves*, 25 Tex. Civ. App. 409, 61 S. W. 550.

\$4,571.75. *Southern Pac. Co. v. Blake* (Tex. Civ. App.), 128 S. W. 668.

\$10,000. *Cannon v. Brooklyn City R. R.*, 14 Misc. 400, 35 N. Y. Supp. 1039.

\$16,000. *International & G. N. R. R. v. Sandlin* (Tex. Civ. App.), 122 S. W. 60.

The following verdicts have been held excessive:

\$10,000. *Indianapolis T. & T. Co. v. Menze*, 173 Ind. 31, 88 N. E. 929.

\$150. *Pratt v. Greenwich & J. Ry.*, 57 App. Div. 628, 68 N. Y. Supp. 117.

<sup>209</sup> For the loss of service of a child the following verdicts have been upheld:

### § 1366. Civil Damage Act.

In some cases the damages awarded under the Civil Damage Act have been held excessive, as in *Franklin v. Schermerhorn*.<sup>210</sup> In this case the plaintiff's husband was a cripple, and could earn but little. He had a pension of \$54 a quarter, became intoxicated and lost \$50, and the jury gave the plaintiff \$75. It was held to have been too large, and that the verdict should have been for \$50. But in *Roth v. Eppy*,<sup>211</sup> where the plaintiff brought an action against defendant for sale and gift of liquors to her husband, whereby he became habitually intoxicated and then insane, it was held that \$1,200 damages were not excessive for the injury to her means of support; and other large verdicts have been upheld.<sup>212</sup>

### § 1367. Damages for death.

Two elements enter into the assessment of damages for death, even when there is no statutory limit and such damages are based on general principles of compensation. In the first place, the actual or potential value of the life in itself is to be considered: the age, trade or profession, earning capacity, etc., of the deceased. In the second place, there is also to be taken into account the value of the life of the particular person; the relationship, the age, poverty, and dependence of

\$300. *Bredeson v. C. A. Smith Lumber Co.*, 91 Minn. 317, 97 N. W. 977.

\$640. *Chicago U. T. Co. v. Brody*, 123 Ill. App. 331.

\$825. *Cincinnati N. & C. Ry. v. Cooke* (Ky.), 121 S. W. 956.

\$1,000. *Johnson v. St. Paul & W. C. Co.*, 131 Wis. 627, 111 N. W. 722.

\$1,800. *Pittsburg, C., C. & S. L. Ry. v. Blum* (Ky.), 125 S. W. 300.

\$1,900. *Texas & N. O. Ry. v. Wood* (Tex. Civ. App.), 24 S. W. 569.

\$2,000. *Akersloot v. Second Ave. Ry.*, 56 Hun, 640, 8 N. Y. Supp. 926.

\$3,000. *Texas & N. O. R. R. v. McLeod* (Tex. Civ. App.), 131 S. W. 311.

\$3,250. *Birmingham R. L. & P. Co. v. Chastain*, 158 Ala. 421, 48 So. 85.

The following verdicts have been held excessive:

\$5,000 (reduced from \$7,000). *Alabama G. S. R. R. v. Burgess*, 119 Ala. 555, 25 So. 251.

\$4,860; reduced to \$3,000. *McHugh v. Rhode Island Co.*, 29 R. I. 206, 69 Atl. 853.

\$4,500. *Hurt v. St. Louis, I. M. & S. Ry.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374.

<sup>210</sup> 8 Hun, 112.

<sup>211</sup> 80 Ill. 283.

<sup>212</sup> \$1,000. *Bennett v. Levi*, 19 N. Y. Supp. 226, 46 N. Y. St. 754.

\$4,500. *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864.

On the other hand, in *Lahey v. Crist*, 130 Ill. App. 152, a verdict of \$3,000 was held excessive, and reduced to \$2,000.



the beneficiary, the disposition of the deceased to use his earnings for the latter's benefit, etc. The existence of these two diverse elements leads to unusual uncertainty in the amount of recovery. Thus in actions for the death of a man <sup>213</sup> of adult

<sup>213</sup> For the death of a man the following verdicts have been upheld:

\$500, man of seventy, able to do light work. *Chesapeake & O. Ry. v. Dupee*, 67 S. W. 15, 23 Ky. L. Rep. 2349.

\$600, man of seventy-one, able to earn more than living. *Moore v. Keokuk & W. R. R.*, 89 Ia. 223, 56 N. W. 431.

\$1,000, man of twenty-seven, not of good habits, earning money. *Johnson v. Rochester Ry.*, 61 App. Div. 12, 70 N. Y. Supp. 113.

\$1,100, unmarried man of thirty-five, salary of \$1,800, assisted mother and sister. *Chicago, R. I. & P. R. R. v. Young*, 67 Neb. 568, 93 N. W. 922.

\$1,324, son of twenty-one, only support of mother. *De Puy v. Cook*, 90 Hun, 43, 35 N. Y. Supp. 632.

\$1,500, man of fifty, wife and four children, received fifty cents an hour. *Boden v. Demwolf*, 56 Fed. 846.

\$1,500, man of forty-three, earning \$150 a month. *El Paso & S. W. R. R. v. Murtle*, 108 S. W. 998, 49 Tex. Civ. App. 273.

\$1,600, fireman, paid mother \$25 a month. *Chicago & E. R. R. v. Stephen-son*, 33 Ind. App. 95, 69 N. E. 270.

\$2,000, unmarried man of thirty-two, contributed to support of parents. *Grace & Hyde Co. v. Strong*, 127 Ill. App. 336.

\$2,000, vigorous man of thirty-five, earning \$10 to \$15 a week. *Sipple v. Laclede Gaslight Co.*, 125 Mo. App. 81, 102 S. W. 608.

\$2,000, unmarried man of twenty-one, earning \$10 a week. *Predmore v. Consumers' L. & P. Co.*, 99 App. Div. 551, 91 N. Y. Supp. 118.

\$2,000, farmer of fifty-six, supporting

wife and daughters. *Choctaw O. & G. R. R. v. Baskins* (Okla.), 93 Pac. 757.

\$2,000, son with expectancy of thirty-six years, contributing \$20 a month to support of mother. *Gulf, C. & S. F. Ry. v. Royall*, 18 Tex. Civ. App. 86, 43 S. W. 815.

\$2,150, laborer. *Chicago, B. & Q. R. R. v. Blank*, 24 Ill. App. 438.

\$2,391.50, man earning \$35 a month and board, sent earnings to parents. *Fordyce v. McCants*, 55 Ark. 384, 18 S. W. 371.

\$2,400, industrious man of twenty-one. *Chicago, etc., R. R. v. Adler*, 28 Ill. App. 102.

\$2,500, deck hand of thirty-eight, devoting wages to three young children. *Cheatham v. Red River Line*, 56 Fed. 248.

\$2,500. *St. Louis, I. M. & S. R. R. v. McCain*, 67 Ark. 377, 55 S. W. 165.

\$2,500, watchman. *Savannah, etc., R. R. v. Flannagan*, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183.

\$2,500, laborer in brewery. *Consolidated Ice Machine Co. v. Kiefer*, 26 Ill. App. 466.

\$2,500, farmer of thirty-three. *Thornton v. Maine S. A. Soc.*, 97 Me. 108, 53 Atl. 979.

\$2,500, unmarried man of twenty-eight, no evidence ever helped father. *Sieber v. Great Northern R. R.*, 76 Minn. 269, 79 N. W. 95.

\$2,500, man of thirty-eight, comfortably provided for wife. *Woxland v. Northwestern C. M. Co.*, 113 Minn. 440, 129 N. W. 856.

\$2,500, unmarried man of twenty-one intended to take care of parents. *Leque v. Madison G. & E. Co.*, 133 Wis. 547, 113 N. W. 946.

\$2,700, laborer of twenty-six, sending

age the amount of verdicts upheld ranges from small to very earnings to mother in Sweden. *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949.

\$3,000, single young man, sole support of mother and younger brothers, earning \$40 to \$50 a month. *O'Callaghan v. Bode*, 84 Cal. 489, 24 Pac. 269.

\$3,000, man left widow and young child. *Falender v. Blackwell*, 39 Ind. App. 121, 79 N. E. 393.

\$3,000, laborer, sole support of wife and three children. *Potter v. St. Louis & S. F. R. R.*, 136 Mo. App. 125, 117 S. W. 593.

\$3,000, unmarried man of twenty-six, earning \$400 a year, never contributed to support of his relatives. *Kane v. Mitchell Transportation Co.*, 90 Hun, 65, 35 N. Y. Supp. 581.

\$3,000, laborer, earning \$1.10 per day, parents dependent on him. *Galveston H. & S. A. Ry. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, 24 S. W. 33.

\$3,250, coal miner leaving widow. *Northern C. & C. Co. v. Allera*, 46 Colo. 224, 104 Pac. 197.

\$3,500, longshoreman of thirty-five, earning \$60 a month. *The Aurora*, 178 Fed. 587.

\$3,500 (reduced from \$5,000), man of sixty-five, earning \$3.50 to \$4.00 a day, left a widow. *Chicago, B. & Q. R. R. v. Sample*, 138 Ill. App. 95, affirmed, *Sample v. Chicago, B. & Q. R. R.*, 233 Ill. 564, 84 N. E. 643.

\$3,500, by widow. *Voelker v. Hill-O'Meara Construction Co.*, 153 Mo. App. 1, 131 S. W. 907.

\$3,500, man of forty, hard worker. *Conklin v. Tice*, 48 Hun, 618, 1 N. Y. Supp. 803.

\$3,500, man of 22½, action by mother. *Missouri Pac. Ry. v. Henry*, 75 Tex. 220, 12 S. W. 828.

\$3,700, man of thirty-one, earning \$50 to \$60 a month, most contributed to plaintiff's support, serving short sen-

tence for misdemeanor. *Tillar v. Reynolds*, 96 Ark. 358, 131 S. W. 959, 30 L. R. A. (N. S.) 1043.

\$3,750, son of twenty-two, contributed \$250 to \$350 a year to mother's support, earning \$1,000. *McVeigh v. Minn. & R. R. Ry.*, 110 Minn. 184, 129 N. W. 852.

\$3,800, section hand of thirty-three, making living for himself and family. *Gulf, C. & S. L. Ry. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699.

\$4,000, seaman of twenty-six, contributing \$300 a year to wife and children. *Nickerson v. Bigelow*, 62 Fed. 900.

\$4,000, healthy young man of twenty-four. *Gould Const. Co. v. Childers*, 129 Ky. 536, 112 S. W. 622.

\$4,000, unmarried son, intended to support parents. *Bright v. Barnett & Record Co.*, 88 Wis. 299, 60 N. W. 418.

\$4,200, man of twenty-six, supported widowed mother. *Texas & P. Ry. v. Lester*, 75 Tex. 56, 12 S. W. 955.

\$4,334.50, father of plaintiff, seventeen years old, who was being educated. *Healy v. Hoy*, 112 Minn. 138, 132 N. W. 208.

\$4,500, brakeman of thirty-four, earning \$60 to \$75 a month, lived with mother and supported her. *St. Louis & S. F. Ry. v. French*, 56 Kan. 584, 44 Pac. 12.

\$4,500, strong man of thirty-eight, provided comfortably for himself and wife. *Woxland v. Northwestern C. M. Co.*, 113 Minn. 440, 129 N. W. 856.

\$4,995, strong man of twenty-eight, earning \$1.75 a day. *Webb v. Denver & R. G. Ry.*, 7 Utah, 17, 26 Pac. 981.

\$5,000, ship's cook of thirty-nine, earning \$50 a month. *In re Humboldt L. M. Assoc.*, 60 Fed. 428.

\$5,000, man of fifty-two. *Hall v. North Pass. C. R. R.*, 134 Fed. 309.

\$5,000, industrious man of twenty-seven, earning \$100 a month. *South-*

large; while on the other hand in a number of cases small

ern Pac. Co. v. Wilson, 10 Ari. 162, 85 Pac. 401.

\$5,000, man of forty-six, widow and six children, to whom contributed \$700 to \$900 a year. St. Louis, I. M. & S. Ry. v. Raines (Ark.), 119 S. W. 665.

\$5,000, laboring man earning \$1.50 a day, leaving widow and two children. Wightman v. Waade, 54 Ill. App. 215, 226.

\$5,000, industrious young man of twenty-two, attending college and earning \$2 a day in vacations. Geo. B. Swift Co. v. Gaylord, 126 Ill. App. 281.

\$5,000, industrious and healthy laborer, supporting wife and several children. Turck v. Chicago, 146 Ill. App. 472.

\$5,000, postal clerk of fifty, earning \$1,150 a year, leaving widow and two dependent sons. Malott v. Shimer, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

\$5,000, industrious man of fifty-eight, earning \$10.50 a week. Indianapolis T. & T. Co. v. Romans, 40 Ind. App. 184, 79 N. E. 1068.

\$5,000, locomotive engineer of forty-one, earning \$1,500 a year, leaving widow and dependent children. Pittsburgh, C. & S. L. Ry. v. Sudhoff, 173 Ind. 314, 90 N. E. 467.

\$5,000, brakeman of twenty-five, earning \$55 a month. Lowe v. Chicago, S. P., M. & O. Ry., 89 Ia. 420, 56 N. W. 519.

\$5,000, man of forty-nine, earning \$8 a week. Louisville Water Co. v. Phillips, 28 Ky. L. Rep. 557, 89 S. W. 700.

\$5,000, man of middle life, earning good wages, left wife and family. Bolinger v. St. Paul & D. R. R., 36 Minn. 418, 31 N. W. 856, 1 Am. St. Rep. 680.

\$5,000, industrious man earning \$2.25 a day, left wife and several children. Peterson v. Merchants' Elevator Co., 111 Minn. 105, 126 N. W. 534, 27 L. R. A. (N. S.) 816.

\$5,000, steamboat engineer, plaintiff, his mother, dependent upon him, third trial. Erwin v. Neversink S. B. Co., 23 Hun, 573.

\$5,000, healthy man of thirty-seven. Johnson v. Long Island R. R., 80 Hun, 306, 30 N. Y. Supp. 318.

\$5,000, man of eighty-five. Underwood v. Old Colony St. Ry., 31 R. I. 253, 80 Atl. 390.

\$5,000, healthy young man who had been supporting family, out of employment at time of death. San Antonio St. Ry. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

\$5,000, farmer of thirty-two, deaf-mute, supported family and helped aged mother. International & G. N. R. R. v. Munn, 46 Tex. Civ. App. 276, 102 S. W. 442.

\$5,500, locomotive engineer of fifty-five, earning \$1,200 a year. Western, & A. R. R. v. Hyer, 113 Ga. 776, 39 S. E. 447.

\$5,500, man of thirty-three, earning \$75 to \$100 a month. Lake Shore & M. S. Ry. v. Hottman, 25 Oh. Cir. Ct. 140.

\$6,000, man of twenty-four contributed to support of parents. Ill. Steel Co. v. Paige, 136 Ill. App. 410, affirmed, Paige v. Ill. Steel Co., 233 Ill. 313, 84 N. E. 239.

\$6,000, industrious young man, principal support of mother and younger brothers. Casey v. Kelly-Atkinson Const. Co., 146 Ill. App. 551, affirmed, 240 Ill. 416, 88 N. E. 982.

\$6,000, man of twenty-one, running milk wagon, supporting wife and child. Racine v. Erie R. R., 69 App. Div. 437, 74 N. Y. Supp. 977.

\$6,000, man of twenty-five, earning \$12 a week. Sembler v. Cowperthwait, 53 Misc. 28, 103 N. Y. Supp. 979.

\$6,000, man of thirty-two, supporting wife and four children. Texas & P. Ry. v. Hudman, 8 Tex. Civ. App. 309, 28 S. W. 388.

\$6,000, man of twenty-five, earning

verdicts have been set aside as excessive, though in most

\$18 to \$25 a week. *Missouri, K. & T. Ry. v. Wall* (Tex. Civ. App.), 110 S. W. 453.

\$6,250, man of fifty-five, earning \$500 to \$1,200 a year. *Paschall v. Owen*, 77 Tex. 583, 14 S. W. 203.

\$6,500, young man contributing \$30 to \$50 a month to mother and invalid sister. *Little Rock & F. S. Ry. v. Voss* (Ark.), 18 S. W. 172.

\$6,908.98, industrious man earning \$630 a year. *Louisville & N. R. R. v. Graham*, 98 Ky. 688, 34 S. W. 229, 17 Ky. L. Rep. 1229.

\$7,000, shipmaster of thirty-five, earning \$100 a month. *In re Humboldt L. M. Assoc.*, 60 Fed. 428.

\$7,000, industrious man of forty-six, saving money. *Ryan v. Oshkosh G. L. Co.*, 138 Wis. 466, 120 N. W. 264.

\$7,500, railroad engineer of twenty-five, earning \$100 to \$130 a month, and giving most of it to his mother. *Baker v. Philadelphia & R. Ry.*, 149 Fed. 882.

\$7,500, industrious man of fifty-two, drawing pension of \$72 a month. *St. Louis, I. M. & S. Ry. v. Maddry*, 57 Ark. 306, 21 S. W. 472.

\$7,500, section foreman of twenty-eight, leaving widow and four children. *Mobile, J. & K. C. R. R. v. Hicks* (Miss.), 46 So. 360.

\$7,830, miner of forty earning \$42 a month. *Atchison, T. & S. F. R. R. v. Hughes*, 55 Kan. 491, 40 Pac. 919.

\$8,000, young man earning \$2.20 a day. *Hass v. Chicago, M. & S. P. Ry.*, 90 Ia. 259, 57 N. W. 894.

\$8,000, brakeman of twenty-three. *Louisville & N. R. R. v. Mulfinger*, 80 S. W. 499, 26 Ky. L. Rep. 3.

\$8,000, mail carrier of thirty-five, earning \$50 a month. *Louisville & N. R. R. v. Lucas*, 98 S. W. 308, 99 S. W. 959, 30 Ky. L. Rep. 539.

\$9,000, sober and industrious man of twenty-nine. *Voelker v. Chicago, M. & S. P. Ry.*, 116 Fed. 867.

\$9,000, station master of thirty-two,

of good habits and business ability. *Louisville & N. R. R. v. Scott*, 108 Ky. 392, 56 S. W. 674, 22 Ky. L. Rep. 30, 50 L. R. A. 381.

\$9,400, industrious young farmer, expectancy of life of thirty-eight years, earning \$50 a month, left wife and infant child. *Pittsburg, C., C. & S. L. Ry. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

\$9,500, man of thirty-two, in mail service, under civil service rules, earning \$1,000 a year. *Malott v. Central Trust Co.*, 168 Ind. 428, 79 N. E. 369.

\$10,000, man of thirty-two, earning \$1,500 a year. *The Oceanic*, 61 Fed. 338.

\$10,000, healthy man with life expectancy of twenty-five years, contributing \$800 a year to family. *St. Louis, I. M. & S. Ry. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

\$10,000 (\$8,000 for widow and \$2,000 for estate), brakeman of thirty-three, earning \$60 a month. *Warren & O. V. R. R. v. Waldrop* (Ark.), 123 S. W. 792.

\$10,000, strong man of twenty-two earning \$90 a month. *Pulaski G. L. Co. v. McClintock*, 97 Ark. 318, 134 S. W. 1189, 32 L. R. A. (N. S.) 825.

\$10,000, man of thirty-eight, earning \$125 a month. *Smith v. Chicago, P. & S. L. Ry.*, 143 Ill. App. 128, affirmed, 236 Ill. 369, 86 N. E. 150.

\$10,000, for death of brakeman. *Louisville & N. R. R. v. Brooks*, 83 Ky. 129, 4 Am. St. Rep. 135.

\$10,000, telegraph operator of sixty-one, earning \$1,000 a year. *Beecher v. Long Island R. R.*, 53 App. Div. 324, 65 N. Y. Supp. 642.

\$10,000, brakeman of twenty-six, earning \$650 a year, prospects of promotion. *Douglass v. Northern Cent. Ry.*, 59 App. Div. 470, 69 N. Y. Supp. 370.

\$10,000, man of thirty-five earning

of the decided cases a verdict for damages for death has \$1.25 a day. *Missouri Pac. Ry. v. Lehmberg*, 75 Tex. 61, 12 S. W. 104, 838.

\$10,000 (\$5,000 for widow, \$5,000 for infant daughter), locomotive engineer earning \$125 a month. *St. Louis, A. & T. Ry. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

\$10,000, engineer of twenty-five, earning \$125 a month. *Texas & P. Ry. v. Geiger*, 79 Tex. 13, 15 S. W. 214.

\$10,000, brakeman of forty, earning \$75 a month, but qualified for higher position in railroad service. *Texas & P. Ry. v. Robertson*, 82 Tex. 657, 17 S. W. 1041, 27 Am. St. Rep. 929.

\$10,000 (\$5,000 for widow, \$5,000 for minor son). *Gulf, C. & S. F. Ry. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538.

\$10,000 (\$5,500 for widow, \$1,500 each for three minor children), man of thirty-seven, earning \$50 a month. *Houston & T. C. R. R. v. Rutland*, 45 Tex. Civ. App. 621, 101 S. W. 529.

\$10,000, fireman of twenty-nine, earning \$50 to \$75 a month. *St. Louis S. W. Ry. v. Holt* (Tex. Civ. App.), 121 S. W. 581.

\$11,000 (\$5,000 to wife, \$3,000 to each of two children), hostler of forty-seven, earning \$60 a month. *Tyler S. E. Ry. v. McMahon* (Tex. Civ. App.), 34 S. W. 796.

\$11,490, man of sixty-three, managing valuable estate. *Chicago, R. I. & G. Ry. v. Trippett* (Tex. Civ. App.), 111 S. W. 761.

\$11,750, healthy industrious man of twenty-seven, earning \$75 to \$100 a month. *Ft. Worth & R. G. Ry. v. Wilkinson*, 50 Tex. Civ. App. 279, 110 S. W. 470.

\$12,000, engineer of thirty-one, earning \$1,300 to \$1,500 a year. *The Volund*, 181 Fed. 643, 104 C. C. A. 373.

\$12,000, manager of insurance company of thirty-four, salary \$2,000.

*Stockton v. Pennsylvania R. R.*, 182 Fed. 282.

\$12,000, railroad engineer, \$125 to \$175 a month. *Vreeland v. Michigan Cent. R. R.*, 189 Fed. 495.

\$12,000, man of twenty-six employed in hardware store at \$75 a month. *Hale v. San Bernardino V. T. Co.*, 156 Cal. 713, 106 Pac. 83.

\$12,000, structural iron worker of twenty-nine, earning \$4 a day. *Conrad v. New York Cent. & H. R. R. R.*, 137 App. Div. 760, 121 N. Y. Supp. 774.

\$12,958, man of thirty-five conducting profitable business. *McCormick v. Rochester Ry.*, 133 App. Div. 760, 117 N. Y. Supp. 1110.

\$13,500, conductor. *Chesapeake & O. R. R. v. Judd*, 106 Ky. 364, 50 S. W. 539, 20 Ky. L. Rep. 1978.

\$14,000, man of thirty, earning \$80 a month. *Tyler S. E. Ry. v. Rasberry*, 13 Tex. Civ. App. 185, 34 S. E. 794.

\$14,000, man of thirty-one, earning \$80 a month. *Texas & P. Ry. v. Johnson*, 48 Tex. Civ. App. 135, 106 S. W. 773.

\$14,000, man in good health, earning \$1,000 to \$1,200 a year. *Temple E. L. Co. v. Halliburton* (Tex. Civ. App.), 136 S. W. 584.

\$14,500, railroad brakeman of thirty, earning \$40 a month. *Louisville & A. R. R. v. Cox* (Ky.), 125 S. W. 1056.

\$14,500, head brakeman of thirty-six, earning \$65 a month, wife and child dependent on him. *Gulf, C. & S. F. Ry. v. Johnson*, 10 Tex. Civ. App. 254, 31 S. W. 255.

\$15,000, healthy young locomotive engineer earning \$125 a month; third verdict. *Southern Ry. v. Scanlon*, 105 S. W. 152, 32 Ky. L. Rep. 38.

\$15,000, physician of fifty, income of \$2,000 a year. *Ericius v. Brooklyn Heights R. R.*, 63 App. Div. 353, 71 N. Y. Supp. 596.

\$15,000, stone-cutter of twenty-nine.

not been set aside as excessive unless it was a remarkably East Line & R. R. Ry. v. Smith, 65 Tex. 167.

\$15,000, head brakeman of thirty, earning \$75 a month, supporting wife and young child. Ft. Worth & R. G. Ry. v. Kime, 21 Tex. Civ. App. 271, 51 S. W. 558.

\$15,000 (\$7,000 for wife, \$4,000 each for two children), section foreman of fifty-four, earning \$100 a month. Galveston, H. & S. A. Ry. v. Perry, 38 Tex. Civ. App. 81, 85 S. W. 62.

\$15,000, bright industrious man of forty-one, earning \$115 a month. Harris v. Puget Sound El. Ry., 52 Wash. 289, 100 Pac. 838.

\$15,190, man of twenty-nine, earning \$2,000 a year, leaving wife and infant child. St. Louis, I. M. & S. Ry. v. Cleere, 76 Ark. 377, 88 S. W. 995.

\$16,000, engineer. San Antonio & A. P. Ry. v. Harding, 11 Tex. Civ. App. 497, 33 S. W. 373.

\$16,000, industrious man of thirty-two, earning \$70 to \$110 a month, in line of promotion. Missouri, K. & T. Ry. v. McDuffey, 50 Tex. Civ. App. 202, 109 S. W. 1104.

\$16,500, railroad employee of forty-three, earning \$100 a month. Houston, E. & W. T. Ry. v. McHale, 47 Tex. Civ. App. 360, 105 S. W. 1149.

\$17,000 (\$7,000 for widow, \$2,500 each for four children). Galveston, H. & S. A. Ry. v. Davis, 27 Tex. Civ. App. 279, 65 S. W. 217.

\$17,500, railway engineer of forty-five, earning \$150 to \$200 a month. Gulf, C. & S. F. Ry. v. Boyce, 39 Tex. Civ. App. 195, 87 S. W. 395.

\$20,000. Texas Loan Agency v. Fleming, 18 Tex. Civ. App. 668, 46 S. W. 63.

\$20,000, section foreman earning \$50 a month. International & G. N. R. R. v. McVey (Tex. Civ. App.), 81 S. W. 991.

\$20,000, healthy man of thirty-three, earning \$90 a month (formerly \$140 a

month), two young children. Texas & N. O. R. R. v. Walker (Tex. Civ. App.), 125 S. W. 99.

\$20,000, engineer of fire department. Houston B. & T. Ry. v. O'Leary (Tex. Civ. App.), 136 S. W. 601.

\$21,000, man of twenty-nine, earning \$150 a month, leaving widow and minor children. Neary v. Northern Pac. Ry. (Mont.), 110 Pac. 226.

\$22,000 (\$10,000 for widow, \$6,000 to each of two daughters), railroad line-man of fifty-three, earning \$75 a month. Freeman v. McElroy (Tex. Civ. App.), 126 S. W. 657.

\$25,000, successful business man of sixty-two, earning \$5,000 a year. Sternfels v. Metropolitan St. Ry., 73 App. Div. 494, 77 N. Y. Supp. 309.

\$25,000, man of thirty-eight, holding life position, salary \$3,300, supporting wife and two children. Lane v. Brooklyn Heights R. R., 85 App. Div. 85, 82 N. Y. Supp. 1057.

\$25,000 (\$10,000 for widow, \$7,500 for each of two young children), locomotive fireman of thirty-six, earning \$80 to \$100 a month, in line of promotion. Galveston, H. & S. A. Ry. v. Mitchell, 48 Tex. Civ. App. 381, 107 S. W. 374.

\$25,000, locomotive engineer of thirty-one, earning \$165 to \$175 a month. Missouri, K. & T. Ry. v. Williams (Tex. Civ. App.), 117 S. W. 1043.

\$25,000 (\$7,000 for wife, \$2,000 for mother, \$8,000 for each of two children). International & G. N. R. R. v. White (Tex. Civ. App.), 120 S. W. 958.

\$27,000, promoter of sixty-one, earning over \$5,000 a year. Boyce v. New York C. Ry., 126 App. Div. 248, 110 N. Y. Supp. 393.

\$30,000, musician of forty-six, earning \$75 to \$100 a month. Jucher v. Whitridge (App. Div.), 128 N. Y. Supp. 233.

\$32,000, locomotive engineer of thirty-five, earning \$150 to \$225 a month, leaving wife and three minor

large one.<sup>214</sup> There is less variation between verdicts for other children. *Houston & T. C. R. R. v. Davenport* (Tex. Civ. App.), 110 S. W. 150.

\$40,000, man of middle age, in good health, earning \$10,000 a year. *Cunningham v. Mutual Reserve Life Ins. Co.*, 125 App. Div. 688, 109 N. Y. Supp. 1070.

<sup>214</sup> For the death of a man the following verdicts have been held excessive:

\$40,000; reduced to \$15,000. *Sergy v. Helena L. & R. Co.* (Mont.), 102 Pac. 310.

\$32,500; reduced to \$25,000. *Kansas City S. Ry. v. Henrie*, 87 Ark. 443, 112 S. W. 967.

\$27,306.12; reduced to \$10,996.95. *Scarpatti v. Metropolitan St. Ry.*, 69 App. Div. 609, 74 N. Y. Supp. 499.

\$25,000; reduced to \$10,000. *Dobyns v. Yazoo & M. V. R. R.*, 119 La. 72, 43 So. 934.

\$25,000; reduced to \$12,500. *Cumberland T. & T. Co. v. Pitchford* (Miss.), 30 So. 41.

\$22,000; reduced to \$15,000. *Coolidge v. New York*, 99 App. Div. 175, 90 N. Y. Supp. 1078.

\$20,000; reduced to \$15,000. *O'Doherty v. Postal T. C. Co.*, 134 App. Div. 298, 118 N. Y. Supp. 871.

\$20,000 (\$10,000 for widow, \$5,000 for each of two children). *Galveston, H. & S. A. Ry. v. Miller* (Tex. Civ. App.), 57 S. W. 702.

\$20,000; reduced to \$16,000. *San Antonio & A. P. Ry. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 210.

\$18,000; reduced to \$12,000. *Hoffman v. New York C. & H. R. R. R.*, 42 Misc. 579, 87 N. Y. Supp. 617.

\$18,000. *Gulf, C. & S. F. Ry. v. Johnson*, 1 Tex. Civ. App. 103, 20 S. W. 1123.

\$18,000 (reduced from \$27,000); reduced to \$12,000. *Ohrstrom v. Tacoma* (Wash.), 106 Pac. 629.

\$17,545; reduced to \$6,000. *Duke v. St. Louis & S. F. R. R.*, 172 Fed. 684.

\$17,000. *Scofield v. Pennsylvania Co.*, 149 Fed. 601.

\$15,000. *Cooper v. New York O. & W. Ry.*, 25 App. Div. 383, 49 N. Y. Supp. 481.

\$13,500; reduced to \$8,000. *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592.

\$12,000; reduced to \$5,000. *Lehman v. Louisiana R. W. Co.*, 37 La. Ann. 705.

\$10,000; reduced to \$6,000. *Felt v. Puget Sound El. Ry.*, 175 Fed. 477.

\$10,000; reduced to \$4,826. *Latchtimacker v. Jacksonville T. & W. Co.*, 181 Fed. 276.

\$10,000; reduced to \$8,000. *St. Louis & N. A. Co. v. Mathis*, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85.

\$10,000; reduced to \$5,000. *Rose v. Des Moines V. R. R.*, 39 Ia. 246.

\$10,000 sufficient. *Stevens v. Union Ry.*, 176 N. Y. 607, 68 N. E. 1125, affirming 75 App. Div. 602, 78 N. Y. Supp. 624.

\$10,000; reduced to \$6,586.73. *Stillings v. Metropolitan St. Ry.*, 84 App. Div. 201, 82 N. Y. Supp. 726.

\$10,000 sufficient. *Gorman v. Hand Brewing Co.*, 28 R. I. 180, 66 Atl. 209.

\$10,000; reduced to \$6,000. *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725.

\$9,395.95. *McAdory v. Louisville & N. R. R.*, 94 Ala. 272, 10 So. 507.

\$8,721; reduced to \$5,000. *O'Connor v. Union Ry.*, 67 App. Div. 99, 73 N. Y. Supp. 606.

\$8,250; reduced to \$6,000. *Engvall v. Des Moines City Ry.*, 145 Ia. 560, 121 N. W. 12.

\$8,000; reduced to \$5,000. *St. Louis, I. M. & S. Ry. v. Caraway*, 77 Ark. 405, 91 S. W. 749.

\$8,000. *Harrison v. Sutter St. R. R.*, 116 Cal. 156, 47 Pac. 1079.

\$8,000; reduced to \$4,000. *Atchison, T. & S. F. Ry. v. Van Belle*, 26 Tex. Civ. App. 511, 64 S. W. 397.

deaths, as for instance in the case of death of an adult woman,<sup>215</sup>

\$7,500. *St. Louis, I. M. & S. Ry. v. Robbins*, 57 Ark. 377, 21 S. W. 886.

\$7,500; reduced to \$2,000. *Cline v. Crescent City Ry.*, 43 La. Ann. 327, 9 So. 122.

\$7,500; reduced to \$6,000. *McFee v. Vicksburg R. R.*, 42 La. Ann. 790, 7 So. 720.

\$7,000; reduced to \$5,000. *Springfield E. L. & P. Co. v. Calvert*, 134 Ill. App. 285, affirmed, 231 Ill. 290, 83 N. E. 184.

\$7,000. *Missouri, K. & T. Ry. v. McLaughlin*, 73 Kan. 248, 84 Pac. 989. \$7,000; reduced to \$4,000. *Geiger v. Worthen & A. Co.*, 66 N. J. L. 576, 49 Atl. 918.

\$6,000; reduced to \$2,000. *Chicago, B. & Q. R. R. v. Weber*, 121 Ill. App. 455.

\$6,000; reduced to \$3,000. *Mexican Nat. R. R. v. Finch*, 8 Tex. Civ. App. 409, 27 S. W. 1028.

\$5,000; reduced to \$1,500. *Lindstrom v. International Nav. Co.*, 117 Fed. 170.

\$5,000. *Denver & R. G. R. R. v. Spencer*, 27 Colo. 313, 61 Pac. 606, 51 L. R. A. 121.

\$5,000. *Leiter v. Kinnare*, 68 Ill. App. 558.

\$5,000; reduced to \$1,500. *Faulkenau v. Rowland*, 70 Ill. App. 20.

\$5,000. *Klemm v. New York C. & H. R. R. R.*, 78 Hun, 277, 28 N. Y. Supp. 861.

\$4,500; reduced to \$2,500. *Hackett v. Wisconsin Cent. Ry.*, 141 Wis. 464, 124 N. W. 1018.

\$4,000; reduced to \$1,000. *Howey v. New England Nav. Co.*, 83 Conn. 278, 76 Atl. 469.

\$4,000. *Chicago & E. I. R. R. v. Vestor* (Ind. App.), 93 N. E. 1039.

\$4,000. *Memphis St. Ry. v. Berry*, 118 Tenn. 581, 102 S. W. 85.

\$4,000. *Rudiger v. Chicago, S. P. M. & O. Ry.*, 101 Wis. 292, 77 N. W. 169.

\$3,600 sufficient. *Garbaccia v. Jer-*

*sey City H. & P. Ry.* (N. J. L.), 53 Atl. 707.

\$3,500; reduced to \$2,500. *Hirschkovitz v. Pennsylvania R. R.*, 138 Fed. 438.

\$3,500; reduced to \$2,000. *Swanson v. Union Stock Yard Co.* (Neb.), 131 N. W. 594.

\$3,500; reduced to \$1,500. *Innes v. Milwaukee*, 103 Wis. 582, 79 N. W. 783.

\$3,000. *Wagner v. H. Clausen & Son B. Co.* (App. Div.), 130 N. Y. Supp. 584.

\$2,500; reduced to \$1,650. *Louisville & N. R. R. v. Trammell*, 93 Ala. 350, 9 So. 870.

\$2,500. *Bond Hill v. Atkinson*, 16 Ohio Cir. Ct. 470, 9 Oh. Cir. Dec. 185.

\$2,000; reduced to \$750. *McKay v. New England Dredging Co.*, 92 Me. 454, 43 Atl. 29.

\$1,750. *Serenson v. Northern Pac. R. R.*, 45 Fed. 407.

\$1,600. *Conley v. Maine Cent. R. R.*, 95 Me. 149, 49 Atl. 668.

\$1,500. *Chicago Terminal Transfer R. R. v. Helberg*, 99 Ill. App. 563.

\$1,500. *Cherokee, etc., Coal, etc., Co. v. Limb*, 47 Kan. 469, 29 Pac. 181.

\$1,500; reduced to \$500. *International & G. N. Ry. v. Jones* (Tex. Civ. App.), 60 S. W. 978.

\$1,500; reduced to \$1,000. *Rombough v. Balch*, 27 Ont. App. 32, 44.

\$1,200; reduced (by plaintiff) to \$1,000. *Central R. R. v. Crosby*, 74 Ga. 737, 58 Am. Rep. 463.

\$500. *San Antonio & A. P. Ry. Engelhorn* (Tex. Civ. App.), 62 S. W. 561.

<sup>215</sup> For the death of a woman the following verdicts have been upheld:

\$800, woman of sixty-eight, helped in household work, supported by children. *Phalen v. Rochester Ry.*, 31 App. Div. 448, 52 N. Y. Supp. 836.

\$1,000, feeble woman of seventy-one. *Chicago v. Kimball*, 18 Ill. App. 240.



of a girl between seven and twenty-one,<sup>216</sup> or of a boy of the

\$1,000, strong widow of seventy-three without dependent children. *Wabash v. Carver*, 129 Ind. 552, 29 N. E. 25, 13 L. R. A. 851.

\$1,400, by surviving husband and children. *Redfield v. Oakland Consol. St. R. R.*, 110 Cal. 277, 42 Pac. 822.

\$1,500, widow of seventy-two, living with children and working. *Walls v. Rochester Ry.*, 92 Hun, 581, 36 N. Y. Supp. 1102.

\$2,500, woman of fifty-nine, partly supporting her husband. *Chicago & A. Ry. v. Wilson*, 128 Ill. App. 88, affirmed 225 Ill. 50, 80 N. E. 56.

\$3,000, widow of forty-six, living with three adult sons. *Chicago, etc., R. R. v. Ptacek*, 62 Ill. App. 375.

\$3,000, widow of sixty, only support of plaintiff, her father, eighty-two years old. *Purcell v. Lauer*, 14 App. Div. 33, 43 N. Y. Supp. 988, 4 N. Y. Annot. Cas. 129.

\$3,500, married woman of thirty-eight, well educated, assisting husband. *Fisher v. Waupaca E. L. & R. Co.*, 141 Wis. 515, 124 N. W. 1005.

\$4,000, married woman of twenty-three, earning \$400 per year. *Denver & R. G. R. R. v. Gunning*, 33 Colo. 280, 80 Pac. 727.

\$4,000, daughter of thirty-six, contributing over \$300 a year. *Bowles v. Rome, W. & O. R. R.*, 46 Hun, 324.

\$4,500, mother of sixty-two, contributing to support of children. *San Antonio & A. P. Ry. v. Long* (Tex. Civ. App.), 26 S. W. 114.

\$5,000, woman of sixty-three, leaving husband and unmarried daughter. *Lyons v. Second Ave. R. R.*, 89 Hun, 374, 35 N. Y. Supp. 372, 2 N. Y. Annot. Cas. 402.

\$6,141, daughter, who partly supported father. *Savannah Electric Co. v. Bell*, 124 Ga. 663, 53 S. E. 109.

\$10,000, married woman of thirty-one. *Norfolk & W. Ry. v. Munsell*, 109 Va. 417, 64 S. E. 50.

The following verdicts were held excessive:

\$10,000, woman of forty-nine, leaving husband and two sons, reduced to \$7,000. *Smith v. Lehigh V. R. R.*, 61 App. Div. 46, 69 N. Y. Supp. 1112.

\$8,000, wife and infant, reduced to \$5,000. *Sherman v. Western Stage Co.*, 24 Ia. 515.

\$7,500, woman of sixty-three. *Medinger v. Brooklyn Heights R. R.*, 6 App. Div. 42, 39 N. Y. Supp. 613.

\$7,000, wife of fifty-six, contributing to support of plaintiffs. *Nelson v. Lake Shore & M. S. Ry.*, 104 Mich. 582, 62 N. W. 993.

\$5,000, sister of forty-five, kept house for brother; reduced to \$2,500. *Rafferty v. Erie R. R.*, 66 N. J. L. 444, 49 Atl. 456.

\$4,140, single woman of twenty-seven, gave parents \$75 per year. *Armour v. Czischki*, 59 Ill. App. 17.

\$4,000, wife of twenty. *Mitchell v. New York C. R. R.*, 2 Hun, 535.

\$3,500, widow of fifty, three adult children. *McIntyre v. New York C. R. R.*, 47 Barb. 515, 1 N. Y. 287.

\$2,750, married daughter contributing \$2.50 a week to plaintiff, her mother. *Indianapolis Commercial Club v. Hilliker*, 20 Ind. App. 239, 50 N. E. 578.

\$1,000, woman of fifty-nine, no facts as to pecuniary loss shown. *St. Louis & S. F. R. R. v. Blinn*, 10 Kan. App. 468, 62 Pac. 427.

<sup>216</sup> For the death of a girl from seven to twenty-one the following verdicts have been upheld:

\$2,000, sixteen year old girl, action by divorced mother. *Wiltse v. Tilden*, 77 Wis. 152, 46 N. W. 234.

\$3,750, girl of fourteen. *Werner v. Brooklyn E. R. R.*, 11 App. Div. 86, 42 N. Y. Supp. 846.

\$5,000, bright girl of twelve, proficient in music and needle work. *Chi-*

same age.<sup>217</sup> In the case of an infant another element of un-  
cago G. W. R. R. *v.* Root, 106 Ill. App. 164.

\$12,500, girl fifteen and one-half years old, stenographer, had position for two months, earning twenty-five dollars a month and salary had been increased. Chesapeake & O. Ry. *v.* Ward (Ky.), 141 S. W. 72.

The following verdicts have been held excessive:

\$9,500, girl of twenty, music teacher, helped parents; reduced to \$5,000. Kellogg *v.* Albany & H. R. & P. Co., 72 App. Div. 321, 76 N. Y. Supp. 85, 11 N. Y. Annot. Cas. 50.

\$6,000, girl of nineteen; reduced to \$4,000. Seeley *v.* New York Cent. & H. R. R. R., 8 App. Div. 402, 40 N. Y. Supp. 866.

\$5,000, girl of seventeen, earning money but not shown to be contributing to family. Chicago, etc., R. R. *v.* Adamick, 33 Ill. App. 412.

\$4,000, girl sixteen years old, took care of her father's house, mother dead, father a laborer, fifty-five years of age; reduced to \$2,500. Dinnihan *v.* Lake Ontario Beach Imp. Co., 8 App. Div. 509, 40 N. Y. Supp. 764.

\$3,500, for girl of eight; reduced to \$2,500. Wells *v.* New York C. & H. R. R. R., 78 App. Div. 1, 78 N. Y. Supp. 991.

<sup>217</sup> For the death of a boy between seven and twenty-one the following verdicts have been upheld:

\$250, boy of eleven. Snyder *v.* Lake Shore & M. S. Ry., 131 Mich. 418, 91 N. W. 643.

\$500, bright boy of seven, St. Louis, etc., R. R. *v.* Dawson, 68 Ark. 1, 56 S. W. 46.

\$700, boy of nineteen. State *v.* Miller, 180 Fed. 796.

£150, boy of fourteen. Bourke *v.* Cork & M. Ry., 4 L. R. Ire. 682.

\$900, boy of fifteen. The Charlotte, 124 Fed. 989.

\$1,000, boy of twelve. New York,

etc., R. R. *v.* Mushbrush, 11 Ind. App. 192, 37 N. E. 954.

\$1,000, boy of seven. Indianapolis T. & T. Co. *v.* Beckman, 40 Ind. App. 100, 81 N. E. 82.

\$1,000, boy of seventeen. Youngquist *v.* Minneapolis St. Ry., 102 Minn. 501, 114 N. W. 259.

\$1,100, boy of thirteen. Citizens' St. R. R. *v.* Lowe, 12 Ind. App. 47, 39 N. E. 165.

\$1,525, boy of seven. Omaha *v.* Bowman, 63 Neb. 333, 88 N. W. 521.

\$1,600, boy of eighteen. The Charlotte, 124 Fed. 989.

\$1,660, boy of eighteen and one-half. Dando *v.* Home Telephone Co., 140 Mo. App. 511, 120 S. W. 644.

\$1,700, boy of sixteen. Thompson *v.* Johnston Bros. Co., 86 Wis. 576, 57 N. W. 298, 26 L. R. A. 524.

\$1,846.46, boy of fifteen, earning four dollars a week. Franke *v.* St. Louis, 110 Mo. 516, 19 S. W. 938.

\$2,400, boy of fourteen. Post *v.* Olmsted, 47 Neb. 893, 66 N. W. 828.

\$2,500, boy of twenty, earning money, had expressed intention to support mother. Memphis D. & G. Ry. *v.* Buckley (Ark.), 138 S. W. 965.

\$2,500, boy of seventeen, earning \$1.30 per day. Illinois Cent. R. R. *v.* Gilbert, 51 Ill. App. 404.

\$2,850, boy of ten. Omaha *v.* Richards, 49 Neb. 244, 68 N. W. 521.

\$3,000, boy of nineteen, earning \$2.50 a day. Chicago & E. R. R. *v.* Branyan, 10 Ind. App. 570, 586, 37 N. E. 190.

\$3,000 (reduced from \$3,500), child of eight. Farrell *v.* Chicago, R. I. & P. R. R., 123 Iowa, 690, 99 N. W. 578.

\$3,000, boy of eleven. Union Pac. R. R. *v.* Dunden, 37 Kan. 1, 14 Pac. 501.

\$3,100, boy of seven. Heinz *v.* Brooklyn Heights R. R., 91 Hun, 640, 36 N. Y. Supp. 675.

certainty is furnished by the fact that the parent is obliged to

\$3,500, boy of twelve, earning \$20 a month. *Lee v. Publishers: Knapp & Co.*, 155 Mo. 610, 56 S. W. 458.

\$3,500, boy of seven and one-half. *St. Louis, S. F. & T. Ry. v. Bolen* (Tex. Civ. App.), 129 S. W. 860.

\$3,500, boy of eighteen. *Hayes v. Chicago, M. & St. P. Ry.*, 131 Wis. 399, 111 N. W. 471.

\$3,750, boy of seven. *Taylor B. & H. R. R. v. Warner* (Tex. Civ. App.), 60 S. W. 442.

\$4,000, boy of seven. *Golden v. Spokane & I. E. R. R.* (Ida.), 118 Pac. 1076.

\$4,000, boy of sixteen, expensively educated, law student. *Atchison, T. & S. F. R. R. v. Fajardo*, 74 Kan. 314, 86 Pac. 301, 6 L. R. A. (N. S.) 681.

\$5,000, boy of sixteen, clerk in grocery store. *Nelson v. Brandford Lighting, etc., Co.*, 75 Conn. 548, 54 Atl. 303.

\$5,000, boy of seven. *Cicero & P. St. R. R. v. Boyd*, 95 Ill. App. 510.

\$5,000, boy of fourteen. *Illinois Cent. R. R. v. Johnson*, 123 Ill. App. 300.

\$5,000, boy of fifteen, earning \$350 to \$500 a year, giving his earnings to his mother. *Commerce C. O. Co. v. Camp* (Tex. Civ. App.), 129 S. W. 852.

\$7,500, boy of sixteen. *Morris v. Metropolitan St. Ry.*, 63 App. Div. 78, 71 N. Y. Supp. 321.

\$12,000, for two children of six and ten. *Cherry v. Louisiana & A. Ry.*, 121 La. 471, 46 So. 596, 17 L. R. A. (N. S.) 505.

The following verdicts were held excessive:

\$18,000, boy of nine. *Illinois Cent. R. R. v. Watson*, 117 Ky. 374, 78 S. W. 175, 25 Ky. L. Rep. 1360.

\$12,000, boy of twelve; reduced to \$7,500. *McDonald v. Metropolitan St. R. R.*, 36 Misc. 703, 74 N. Y. Supp. 367.

\$8,000, boy of eight. *Vicksburg v. McLain*, 67 Miss. 4, 6 So. 774.

\$7,487, boy of fourteen; reduced to \$2,500. *McDonald v. Champion I. & S. Co.*, 140 Mich. 401, 103 N. W. 829.

\$6,000, boy of eight and one-half; reduced to \$3,000. *Schaffer v. Baker Transfer Co.*, 29 App. Div. 459, 51 N. Y. Supp. 1092.

\$5,126, boy of twelve; reduced to \$2,000. *Rowe v. New York & N. J. T. Co.*, 66 N. J. L. 19, 48 Atl. 523.

\$5,000, boy of ten. *North Chicago St. R. R. v. Wrixon*, 51 Ill. App. 307.

\$5,000; reduced to \$2,000. *Jackson v. Consolidated Traction Co.*, 59 N. J. L. 25, 35 Atl. 754.

\$5,000, boy of seven; reduced to \$3,000. *Riley v. Salt Lake R. T. Co.*, 10 Utah, 428, 37 Pac. 681.

\$4,500, boy of seventeen, contributed not more than \$90 a year. *Kerling v. G. W. Van Dusen & Co.*, 108 Minn. 51, 124 N. W. 235.

\$3,000, boy of nineteen; reduced to \$2,000. *Barnes v. Columbia Lead Co.*, 107 Mo. App. 608, 82 S. W. 203.

\$3,000, boy of sixteen, not likely to earn more than \$20 a month during minority; reduced to \$1,500. *May v. West Jersey & S. R. R.*, 62 N. J. L. 67, 42 Atl. 165.

\$2,500, boy of thirteen, plaintiff, father, had abandoned family, boy earned fifty cents a day. *Cook v. American E. C. & S. G. Co.*, 70 N. J. L. 65, 56 Atl. 114.

\$2,118, boy of nineteen; reduced to \$1,500. *Stumbo v. Duluth Zinc Co.*, 100 Mo. App. 635, 75 S. W. 185.

\$1,050, boy of fourteen. *Telfer v. Northern R. R.*, 1 Vr. (29 N. J. L.) 188.

\$900, boy of ten, father had not been heard from for five years, no other relatives; reduced to \$500. *Grieve v. North Jersey St. Ry.*, 65 N. J. L. 409, 47 Atl. 427.

support the child during his minority, and the excess of the probable earning power of the child over the cost of his support is problematical.<sup>218</sup>

<sup>218</sup> For the death of an infant under seven the following verdicts have been upheld:

\$299.71 each, children of one and three years. *Chapman v. Pfarr*, 145 Ia. 196, 132 N. W. 957.

\$375, girl of three and one-half. *Reger v. Rochester R. R.*, 2 App. Div. 5, 37 N. Y. Supp. 520.

\$1,500, child of twenty-one months. *Chicago & A. R. R. v. Logue*, 58 Ill. App. 142.

\$1,578, child of six. *Hoon v. Beaver Valley Traction Co.*, 204 Pa. 369, 54 Atl. 270.

\$2,000, child under five. *York v. Pacific & I. N. Ry.*, 8 Ida. 574, 69 Pac. 1042.

\$2,000 (reduced from \$3,750), child of three. *Chicago, etc., R. R. v. Des Lauriers*, 40 Ill. App. 654.

\$2,000, girl of five. *Huerzeler v. Central C. T. R. R.*, 1 Misc. 136, 20 N. Y. Supp. 676.

\$2,000, child of four. *Moskovitz v. Lighte*, 68 Hun, 102, 22 N. Y. Supp. 732.

\$2,000, boy of eighteen months. *Houston City St. Ry. v. Sciacca*, 80 Tex. 350, 16 S. W. 31.

\$2,300, boy of six. *Strutzel v. St. Paul City Ry.*, 47 Minn. 543, 50 N. W. 690.

\$2,750, child under six. *Gray v. St. Paul City Ry.*, 87 Minn. 280, 91 N. W. 1106.

\$3,500, boy of six, only child of widowed mother. *San Antonio St. Ry. v. Watzlavzick* (Tex. Civ. App.), 28 S. W. 115.

\$4,800, boy over four. *De Amado v. Friedman* (Ari.), 89 Pac. 588.

\$5,000, boy of six. *Chicago City Ry. v. Strong*, 129 Ill. App. 511, affirmed, 230 Ill. 58, 82 N. E. 335.

\$5,500, child of two. *Galveston, H.*

*& N. Ry. v. Olds* (Tex. Civ. App.), 112 S. W. 787.

\$6,000, boy of two. *Austin R. T. Ry. v. Cullen* (Tex. Civ. App.), 29 S. W. 256.

In *Chicago City Ry. v. Strong*, 129 Ill. App. 511, the court used the following language: "He was an American youth and every ambition of life was open to him, and fame and distinction and high place in this free republic were not barred to him. The country's history is replete with names which shine luminous upon the screen of fame, who climb into the giddy heights of prominence and usefulness as the labor of patriotic endeavor, from as humble a station in life as that to which the deceased was born. What comfort and financial support he might have been to his next of kin, we can never know. What sorrow or charge upon them he might have come is equally denied." This line of thought seems to indicate that other considerations than those of mere pecuniary loss are allowed to govern the amount of recovery.

The following verdicts were held excessive:

\$20,000, child of two. *Morgan v. Southern Pac. Co.*, 95 Cal. 510, 30 Pac. 603, 29 Am. St. Rep. 143, 17 L. R. A. 71.

\$10,500, child under four. *Louisville & N. R. R. v. Creighton*, 50 S. W. 227, 20 Ky. L. Rep. 1691, 1898.

\$6,000, child of four and one-half. *Fox v. Oakland Consol. St. R. R.*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216.

\$5,000, boy of four. *Graham v. Consolidated Trac. Co.*, 64 N. J. L. 10, 44 Atl. 964, 65 N. J. L. 539, 47 Atl. 453.

\$4,000, boy of four; reduced to \$3,000. *Hively v. Webster County*, 117 Ia. 672, 91 N. W. 1041.

### § 1368. Inadequate damages.

The forbearance of the court to interfere with the jury is so great that, in actions of tort, the general rule was once said to be, that a new trial will not be granted for smallness of damages.<sup>219</sup> And it is still true that a new trial will not ordinarily be granted for this reason, especially where there is no pecuniary standard for the estimate of damages, as where they are given for pain and suffering; <sup>220</sup> because juries seldom underestimate the amount of damages.<sup>221</sup> So clearly is this felt to be the case, that courts are sometimes forbidden by statute to set aside verdicts in personal injury cases on the ground of inadequacy.<sup>222</sup>

But while this is generally true, it is now well settled that if the jury so far disregard the justice of the case as to give no damages at all where some redress is clearly due, the court will interpose.<sup>223</sup> So where, in case for negligence, for defendant's servant driving against the plaintiff, it appeared that the plaintiff's thigh was broken, and considerable expense incurred for surgical treatment; the plaintiff obtained a verdict,

\$3,500, girl under four. *West Chicago St. R. R. v. Scanlan*, 68 Ill. App. 626.

\$3,000 (reduced from \$5,000) child of 6½. *Gunderson v. Northwestern Elevator Co.*, 47 Minn. 161, 49 N. W. 694.

\$2,000, girl of five; reduced to \$1,000. *Fleming v. Lobel* (N. J. L.), 59 Atl. 27.

\$1,500, boy of four and one-half. *Lehman v. Brooklyn*, 29 Barb. 234.

<sup>219</sup> *Lord Townsend v. Hughes*, 2 Mod. 150; *Mauricet v. Brecknock*, 2 Doug. 509; *Hayward v. Newton*, 2 Strange, 940; *Barker v. Dixie*, 2 Strange, 1051; 21 Vin. Abr. 486, Trial Y, g.; *Gower v. Heath*, Barnes' Notes, 445; *Regina v. Justices of West Riding*, 1 Q. B. 624, 631; *Hayward v. Newton*, 2 Str. 940; *Kelly v. Sherlock*, L. R. 1 Q. B. 686; *Howard v. Barnard*, 11 C. B. 653 (in which case the point was considered that the jury had not been influenced by improper motives); *Apps*

*v. Day*, 14 C. B. 112; *Bradlaugh v. Edwards*, 11 C. B. (N. S.) 377; *Kennedy v. Way*, 7 West. L. J. 414. And this was held especially true when the judge at Nisi Prius was satisfied with the verdict. *Gibbs v. Tunaley*, 1 C. B. 640.

<sup>220</sup> *Lufkin v. Hitchcock* (Mass.), 80 N. E. 456.

<sup>221</sup> *Bolles v. Bloomington & N. R. E. & H. Co.*, 130 Ill. App. 263.

<sup>222</sup> *Kentucky* (for pain): *Netter v. Louisville Ry.*, 134 Ky. 678, 121 S. W. 636.

*Nebraska*: *O'Reilly v. Hoover*, 70 Neb. 357, 97 N. W. 470; *Langdon v. Clarke*, 73 Neb. 516, 103 N. W. 62.

<sup>223</sup> *Connecticut*: *Nicholson v. N. Y. & N. H. R. R.*, 22 Conn. 74, 56 Am. Dec. 390.

*New York*: *Clapp v. Hudson River R. R.*, 19 Barb. 461 (*semble*).

*England*: *Rendall v. Hayward*, 5 Bing. (N. S.) 424.

damages *one farthing*; a new trial was granted on payment of costs; and Lord Denman said: "A new trial on a mere difference of opinion as to amount, may not be grantable; but *here* are no damages at all."<sup>224</sup> And it is now settled that a verdict will be set aside as inadequate for the same reasons that justify setting a verdict aside if excessive.<sup>225</sup>

If the entire injury is pecuniary, and the verdict is for less than the undisputed pecuniary loss, the verdict will be set aside as inadequate. So on a taking of land where damage was undisputed a verdict of six cents would be set aside as inadequate;<sup>226</sup> and for breach of a contract to sell, a verdict for \$100 was set aside where the undisputed evidence showed a much greater pecuniary damage.<sup>227</sup> So, in trespass, where the jury had not given the entire value of the property taken, the verdict was not allowed to stand.<sup>228</sup> And in an action brought by a seller against a purchaser, to recover damages for not accepting and paying for the goods sold, the judge set aside the verdict for the plaintiff, because, although a verdict for the defendants would not have been disturbed, the damages found by the jury were less than any of the evidence in the case justified, if there were any recovery whatever.<sup>229</sup> In

<sup>224</sup> *Armtyage v. Haley*, 4 Q. B. 917. See, also, *Cook v. Beal*, 1 Ld. Raym. 176; s. c. 3 Salk. 115; *Brown v. Seymour*, 1 Wils. 5; *Austin v. Hilliers*, Hard, 408.

<sup>225</sup> *Florida*: *Duncan v. Jackson*, 16 Fla. 338.

*Georgia*: *Anglin v. Columbus*, 128 Ga. 469, 57 S. E. 780.

*Illinois*: *Kilmer v. Parrish*, 144 Ill. App. 270.

*Iowa*: *Tathwell v. Cedar Rapids*, 122 Ia. 50, 97 N. W. 96.

*Louisiana*: *Sullivan v. Vicksburg*, S. & P. R. R., 39 La. Ann. 800, 4 Am. St. Rep. 239, 2 So. 586; *Caldwell v. Vicksburg*, S. & P. R. R., 41 La. Ann. 624, 61 So. 217.

*Minnesota*: *Marsh v. Minneapolis B. Co.*, 92 Minn. 182, 99 N. W. 630.

*Missouri*: *Watson v. Harmon*, 85 Mo. 443; *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265.

*New Jersey*: *Wilson v. Morgan*, 58 N. J. L. 426, 34 Atl. 752.

*New York*: *Brown v. Foster*, 1 App. Div. 578, 37 N. Y. Supp. 502.

*Wisconsin*: *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809.

*Ireland*: *Beattie v. Moore*, L. R. 2 Ire. 28, 31.

<sup>226</sup> *In re Brooklyn U. E. R. R.*, 95 App. Div. 108, 88 N. Y. Supp. 426.

<sup>227</sup> *Daniel v. Allen*, 149 Ill. App. 351.

<sup>228</sup> *Porteous v. Hazel*, Harp. (S. C.) 332. So in case of wrongful use of a horse and wagon, where only nominal damages were given. *Gardner v. Baer*, 26 Misc. 181, 56 N. Y. Supp. 1096.

<sup>229</sup> *McDonald v. Walter*, 40 N. Y. 551. So in case of personal injury. *Saperstone v. Rochester Ry.*, 25 App. Div. 285, 49 N. Y. Supp. 486. So in case of injury to property. *Kerr v. Union Ry.*, 20 Misc. 171, 45 N. Y. Supp. 819.

*Wilson v. Hicks*,<sup>230</sup> an action on contract, this power was exercised conditionally upon the plaintiff's relinquishing the costs of the first trial.

This right will be enforced, particularly in those cases in which the smallness of the verdict shows that the jury have made a compromise.<sup>231</sup> In cases of insufficient damages, the verdict should not be annulled if the defendant will consent to an increase of the amount of damages,<sup>232</sup> and the court can sometimes indicate the sum by which the verdict should be increased. Thus in *Alloway v. Nashville*,<sup>233</sup> where the jury erred in omitting interest, the interest was added by the court without ordering a new trial. In *Howard v. Barnard* <sup>234</sup> the court said, that if there is no reason to suppose that the jury was actuated by improper motives, or if another verdict would probably be so small that a new trial would not be worth while in view of the additional costs, the verdict will be upheld. The most important case upon this subject is *Phillips v. South West Railway*.<sup>235</sup> The action was brought to recover damages for personal injuries sustained on the defendant's railway. The plaintiff was a physician, receiving an income of £5,000 a year from his practice. He was permanently disabled, mentally and physically, and had already been unable to exercise his profession for sixteen months. It was also shown that his life had undoubtedly been shortened. A verdict for £7,000 was set aside, and a new trial awarded, upon the ground that the damages were inadequate. On a second trial the plaintiff recovered £16,000, and this was held not to be excessive.<sup>236</sup>

**§ 1369. Failure to allow damages where compensation should be given.**

Where the jury fail altogether to allow damages in cases where the plaintiff is by law entitled to compensation, the verdict will be set aside. Thus where an action is brought for serious personal injuries, a verdict for nominal damages will

<sup>230</sup> 26 L. J. Ex. 242.

<sup>233</sup> 88 Tenn. 510.

<sup>231</sup> *Falvey v. Standford*, L. R. 10 Q. B. 54; although, in *Richards v. Rose*, 9 Ex. 218, this rule was doubted.

<sup>234</sup> 11 C. B. 653.

<sup>235</sup> 5 Q. B. D. 78.

<sup>232</sup> *Richards v. Sandford*, 2 E. D. Smith, 349.

<sup>236</sup> *Phillips v. London & S. W. Ry.*, 5 C. P. D. 280.

be set aside.<sup>237</sup> A verdict which does no more than cover the necessary surgical expenses, will receive the same treatment; <sup>238</sup> *a fortiori* when it is even less than the actual expenses.<sup>239</sup> So in other actions, where the existence of some damage is sufficiently proved to justify recovery of a substantial amount, a verdict for nominal damages will be set aside as inadequate.<sup>240</sup>

### § 1370. What damages are inadequate; torts in general.

It remains to consider what verdicts have actually been passed upon by the courts and held inadequate and not inadequate. It has already been pointed out that the court is much less free in holding a verdict inadequate than in holding it excessive, and the number of cases in which such verdicts have been considered by the courts is comparatively small; yet there are enough recent decisions to give a somewhat definite idea of the way in which courts act. Thus verdicts have been considered from the point of view of inadequacy in actions for false imprisonment,<sup>241</sup> malicious prosecution,<sup>242</sup> and slan-

<sup>237</sup> *New York*: Robbins v. Hudson River R. R., 7 Bosw. 1; Sloane v. McCauley, 33 Misc. 652, 68 N. Y. Supp. 187; Lerner v. Cohen, 116 N. Y. Supp. 567.

*Texas*: Canthen v. Breyer (Tex. Civ. App.), 131 S. W. 853.

*Ireland*: Beattie v. Moore, L. R. 2 Ire. 28.

Of course, the evidence may justify a recovery of nominal damages only, by showing a mere technical wrong with no actual damages. Henderson v. McReynolds, 60 Hun, 579, 14 N. Y. Supp. 351.

<sup>238</sup> *New York*: Katz v. Brooklyn Heights R. R., 35 Misc. 302, 71 N. Y. Supp. 744.

*Rhode Island*: Hill v. Union Ry. (R. I.), 57 Atl. 374.

<sup>239</sup> *Illinois*: Kilmer v. Parrish, 144 Ill. App. 270.

*Maine*: Leavitt v. Dow, 105 Me. 50, 72 Atl. 735.

*Nebraska*: Carpenter v. Red Cloud, 64 Neb. 126, 89 N. W. 637.

*England*: Tedd v. Douglas, 5 Jur. (N. S.) 1029.

<sup>240</sup> *Alabama*: Hardeman v. Williams, 157 Ala. 422, 48 So. 108 (trespass on property).

*South Carolina*: English v. Clerry, 3 Hill, 279 (cutting trees).

*Texas*: Prewitt v. Southwestern T. & T. Co., 46 Tex. Civ. App. 123, 101 S. W. 812 (failure to deliver telegram).

<sup>241</sup> For false imprisonment the following damages have been held inadequate:

Six cents. Henderson v. McReynolds, 60 Hun, 579, 14 N. Y. Supp. 351.

The following have been held adequate:

\$50. Taylor v. Davis (Tex.), 13 S. W. 642.

Six cents. Wegne v. Risch, 114 Wis. 270, 90 N. W. 168.

<sup>242</sup> For malicious prosecution the following damages have been held inadequate:

\$450. Maille v. Lacassagne, 35 La. Ann. 594.

\$1, increased to \$300. Mequet v.



der,<sup>243</sup> in actions against a carrier for assault upon a passenger by its servant,<sup>244</sup> and in actions for assault and battery.<sup>245</sup>

### § 1371. Personal injuries.

For personal injuries of various kinds a considerable number of verdicts have been considered by the courts and their adequacy passed upon.<sup>246</sup>

Silverman, 52 La. Ann. 1369, 27 So. 885.

<sup>243</sup> For slander the following damages have been held inadequate:

\$25 increased to \$500. *Simpson v. Robinson*, 104 La. 180, 28 So. 908.

<sup>244</sup> For assault on a passenger by the conductor or motorman the following verdicts have been held inadequate:

Eighty-five cents. *Hanson v. Urbana & C. E. S. Ry.*, 75 Ill. App. 474.

\$5. *Samuels v. New York City Ry.*, 52 Misc. 137, 101 N. Y. Supp. 534.

\$200. *Tourtelotte v. Westchester Electric Ry.*, 120 App. Div. 417, 105 N. Y. Supp. 50.

<sup>245</sup> For assault and battery a verdict of \$1 was held inadequate in *Dunbar v. Cowger*, 68 Ark. 444, 59 S. W. 951.

<sup>246</sup> For personal injuries the following damages have been held inadequate:

\$5. *Moseley v. Jamison*, 68 Miss 336, 8 So. 744.

\$15. *Kelly v. Rochester*, 15 N. Y. Supp. 29, 60 Hun, 582.

\$55. *Saperstone v. Rochester Ry.*, 25 App. Div. 285, 49 N. Y. Supp. 486.

\$100; increased to \$600. *Sullivan v. Vicksburg S. & P. R. R.*, 39 La. Ann. 800, 2 So. 586, 4 Am. St. Rep. 239.

\$100. *Ellsworth v. Fairbury*, 41 Neb. 881, 60 N. W. 336.

\$100. *Maier v. Schulang*, 117 N. Y. Supp. 928.

\$150. *Fahlbusch v. Brooklyn Heights R. R.*, 129 N. Y. Supp. 877.

\$250. *Byrd v. Texas Midland R. R.* (Tex. Civ. App.), 99 S. W. 734.

\$300. *Harris v. Scher*, 63 Misc. 288, 116 N. Y. Supp. 722.

\$400, loss of eye, actual expense and

loss of time twice amount of verdict. *De Freitas v. Nunes*, 130 Ill. App. 195.

\$500, loss of arm. *Townsend v. Briggs*, 88 Cal. 230, 26 Pac. 108.

\$500, permanent injuries, eight months' loss of time. *Loyacano v. Jurgens*, 50 La. Ann. 441, 23 So. 717.

\$500, mental anguish and terror. *Warner v. Talbot*, 112 La. 817, 36 So. 743.

\$500, permanent stiffness of arm. *Richardson v. Missouri F. B. Co.*, 122 Mo. App. 529, 99 S. W. 778.

\$500, permanent injury, \$400 expenses. *Morrissey v. Westchester Electric Ry.*, 30 App. Div. 424, 51 N. Y. Supp. 945.

\$1,000, loss of part of hand. *Rossey v. Lawrence*, 123 La. 1053, 49 So. 704.

\$1,500, loss of right hand, value of time equal to amount. *Abotin v. Heney*, 62 Wash. 65, 113 Pac. 245.

\$2,000, loss of leg; increased to \$5,000. *Taylor v. Louisiana & N. W. R. R.*, 129 La. 000, 55 So. 732.

\$2,500, loss of leg. *Danna v. Monroe*, 129 La. 000, 55 So. 741.

\$2,525, injury to eyesight and heart. *Toledo R. & L. Co. v. Mason*, 81 Oh. St. 463, 91 N. E. 292.

\$3,450, permanent crippling. *Alton v. Chicago, M. & St. P. Ry.*, 107 Minn. 457, 120 N. W. 749.

\$10,000, complete disability; increased to \$15,000. *Englert v. New Orleans R. & L. Co.*, 128 La. 473, 54 So. 963.

The following verdicts have been upheld:

### § 1372. Death.

In actions for death, as in other actions, the courts may set aside verdicts as inadequate; and the cases in which verdicts are considered for the death of a person whose life is of pecuniary value are governed by the same considerations as cases in which similar verdicts for personal injury are claimed to be excessive.<sup>247</sup> In the case of children too young to be of service, however, in order for their life to be of pecuniary value they must reach an age to be useful; and thereafter their earnings during minority should be sufficiently greater than the expense of maintenance to more than pay the whole cost of their previous maintenance, with interest; otherwise their death is not a pecuniary loss. Since this must in the nature of things be more or less uncertain, a verdict for the death of a

\$3,000. *Hall v. Chicago, B. & Q. Ry.*, 145 Ia. 291, 122 N. W. 894.

\$2,500. *Schmidt v. Chicago, M. & S. P. Ry.*, 108 Minn. 329, 122 N. W. 9.

\$2,000. *Joiner v. Texas & P. Ry.*, 128 La. 1050, 55 So. 670.

\$1,750. *Killen v. North Jersey St. Ry.*, 74 N. J. L. 286, 65 Atl. 836.

\$1,200. *Allison v. Fredericksburg (Va.)*, 71 S. E. 525.

\$1,000. *Bogges v. Metropolitan St. Ry.*, 118 Mo. 328, 23 S. W. 159, 24 S. W. 210.

\$800. *Lanphier v. F. Johnson & Son Co.*, 117 La. 741, 42 So. 254.

\$750. *Cleaver v. Louisville & N. R. R.*, 100 S. W. 223, 30 Ky. Law Rep. 1059.

\$400. *Marcus v. Omaha & C. B. R. & B. Co.*, 142 Ia. 84, 120 N. W. 469.

\$167. *Robinson v. Waupaca*, 77 Wis. 544, 46 N. W. 809.

\$150. *Kalembach v. Michigan Cent. R. R.*, 87 Mich. 509, 49 N. W. 1082.

\$100. *Dowd v. Westinghouse A. B. Co.*, 132 Mo. 579, 34 S. W. 493.

<sup>247</sup> For the death of an adult the following verdicts have been held inadequate:

One cent. *James v. Richmond & D. R. R.*, 92 Ala. 231, 9 So. 335.

\$1. *Rawitzer v. St. Paul City Ry.*, 94 Minn. 494, 103 N. W. 499.

\$150 ("a travesty of justice"). *Meyer v. Hart*, 23 App. Div. 131, 48 N. Y. Supp. 904.

\$200 ("a mockery of justice"). *Mariani v. Dougherty*, 46 Cal. 26.

\$500. *McCarty v. St. Louis Transit Co.*, 192 Mo. 396, 91 S. W. 132.

\$500. *Burns v. Merchants' & P. O. Co.*, 26 Tex. Civ. App. 223, 63 S. W. 1061.

\$3,250. *Usher v. Scranton Ry.*, 13 Fed. 405.

£7,000. *Phillips v. London & S. W. Ry.*, 5 Q. B. D. 78.

The following verdicts have been held not inadequate:

\$3,500. *Stewart v. Louisville & N. R. R.*, 125 S. W. 154 (Ky.).

\$1,000. *Connor v. New York*, 28 App. Div. 186, 50 N. Y. Supp. 972.

\$800. *Metropolitan St. Ry. v. O'Neill*, 68 Kan. 252, 74 Pac. 1105.

\$600. *Swanton v. King*, 72 App. Div. 578, 76 N. Y. Supp. 528.

\$189.75. *De Luna v. Union R. R.*, 130 App. Div. 386, 114 N. Y. Supp. 893.

\$55. *Leahy v. Davis*, 121 Mo. 227, 25 S. W. 941.

child will seldom be so clearly inadequate as to be set aside for that reason.<sup>248</sup>

<sup>248</sup> For the death of a child too young for his labor to be of pecuniary value the following verdicts have been set aside as inadequate:

\$10. *Draper v. Tucker*, 69 Neb. 434, 95 N. W. 1026.

\$300. *Willsen v. Metropolitan St. Ry.*, 74 N. Y. Supp. 774.

\$1,500; increased to \$3,000. *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025.

The following verdicts have been held not inadequate:

\$600. *Terhune v. Joseph W. Cody Contracting Co.*, 72 App. Div. 1, 76 N. Y. Supp. 255.

\$375. *Reger v. Rochester Ry.*, 2 App. Div. 5, 37 N. Y. Supp. 520.

\$200. *Gubbitosi v. Rothschild*, 75 App. Div. 477, 78 N. Y. Supp. 286 (reversing 74 N. Y. Supp. 775).

Six cents. *Silberstein v. Wm. Wicke Co.*, 29 Abb. N. C. 291, 22 N. Y. Supp. 170.

## CHAPTER LIX

### THE CONFLICT OF LAWS

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|--|---|
| § 1373. General principles.                | § 1379. Presumption as to legal rate of interest. |
| 1374. Actions against telegraph companies. | 1380. Exemplary damages.                          |
| 1375. Action on a bill or note.            | 1381. Liquidated damages.                         |
| 1376. Damages for death.                   | 1382. Medium of payment.                          |
| 1377. Rate of interest.                    | 1383. Matters of procedure.                       |
| 1378. Interest on judgments.               |   |

#### § 1373. General principles.

The measure of damages is, as has been seen, a question of right rather than of remedy. The law, as a result of the breach of a contract or commission of a tort, creates a right to damages which is equivalent to the right destroyed. Not merely the existence but the nature of this right, including its extent, is determined by the law that created it, as matters necessarily involved in the very creation of the right. "From all the facts attending the injury," said Paynter, J., in *Louisville & Nashville Railroad v. Whitlow*,<sup>1</sup> "it must be determined whether the defendant has incurred a liability for damages and the extent of it. The law of Tennessee (the place of injury) must govern in fixing the liability and the *quantum* of recovery. It would be strange to apply the law of Tennessee in determining the question of liability, and take the law of the forum to fix the measure of recovery." In accordance with these principles, the measure of damages is regulated by the law that creates the right of action, which is, in the case of a tort, the law of the place where the injury occurred,<sup>2</sup> and in the case of breach of contract, the law of the place where the breach occurred, that is, the law of the place of performance.<sup>3</sup>

<sup>1</sup> 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614; and see a learned note, reaching this conclusion, in 56 L. R. A. 301.

<sup>2</sup> *Louisville & N. R. R. v. Whitlow*, 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614.

<sup>3</sup> *United States: Sandham v. Grounds*, 94 Fed. 83, 36 C. C. A. 103.

*Massachusetts: Meyer v. Estes*, 164 Mass. 457, 41 N. E. 683.

*Missouri: Matheny v. Stewart*, 108 Mo. 73, 78 S. W. 1014.

*In Atwood v. Walker*, 179 Mass. 514,

Whether the damages shall be assessed in a single lump sum or in the form of a weekly or other occasional payment, like other questions connected with the measure of damages, should be determined by the law of the place of injury. So where, under Mexican law, damages arising out of an injury are not assessed in a single action, in which past and prospective damages are included, but damages to the date of the trial only are given, a court in the United States, in which suit is brought for a personal injury in Mexico, will not carry the adjustment of compensation any further than the Mexican court would do.<sup>4</sup>

### § 1374. Actions against telegraph companies.

In actions against telegraph companies the cause of action may sound in contract, for a non-feasance in failing to send or to deliver a telegram, or in tort for a misdelivery or other tortious violation of the public duty. In the latter case the law of the place where the duty is violated alone should govern the measure of damages, according to the principles already discussed; in the former case it might be possible to allege a breach of contract either at the place where the delay occurred or at the place of delivery, and the plaintiff might therefore claim the choice of the two laws. And it is so held in some jurisdictions.<sup>5</sup>

In several jurisdictions, however, the court determines the damages entirely in accordance with the law of the place from which the telegram was sent, *i. e.*, the place where the contract was made.<sup>6</sup>

61 N. E. 58 (where the place of making and of performance appear to have been the same), the court intimated that where they are different the measure of damages, like the obligation of the contract itself, is determined by the law of the place of making. This notion seems to lose sight of the fact that the right to damages forms no part of the original obligation, and is created, not by the contract, but by the law upon breach of the contract.

<sup>4</sup> *Evey v. Mexican Cent. Ry.*, 81 Fed. 294, 26 C. C. A. 407, 52 U. S. App. 118, 139, 38 L. R. A. 387.

<sup>5</sup> *Alabama*: *Western U. T. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648.

*Arkansas*: *Western U. T. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 479; *Western U. T. Co. v. Crenshaw*, 93 Ark. 415, 125 S. W. 420; *Western U. T. Co. v. Chilton* (Ark.), 140 S. W. 26.

*Kentucky*: *Western U. T. Co. v. Lacer*, 122 Ky. 839, 93 S. W. 34, 5 L. R. A. (N. S.) 751.

<sup>6</sup> *North Carolina*: *Hancock v. Western U. T. Co.*, 137 N. C. 497, 49 S. E. 952, 69 L. R. A. 403; *Johnson v. Western U.*

### § 1375. Action on a bill or note.

When a bill of exchange is protested for non-acceptance or non-payment, the drawer is liable to damages according to the law of the place where it was drawn.<sup>7</sup> If suit is brought in a foreign State, and there is no proof offered of the law where the bill is drawn, the law merchant prevails, and re-exchange is recovered.<sup>8</sup> In an action against an indorser the measure of damages is governed by the law of the place where the indorsement was made.<sup>9</sup> The allowance of interest is governed by the law of the place of payment.<sup>10</sup>

### § 1376. Damages for death.

The measure of damages for the death of a human being, in a statutory action for the death, depends upon the law of the place where the injury was committed;<sup>11</sup> and the method in which the amount recovered is to be distributed is also determined by that law, which in effect gives a beneficial interest in the amount recovered to the distributees.<sup>12</sup>

T. Co., 144 N. C. 410, 57 S. E. 122, 10 L. R. A. (N. S.) 256.

*Texas*: *Western U. T. Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354, and cases cited; *Western U. T. Co. v. Young* (Tex. Civ. App.), 133 S. W. 512.

<sup>7</sup> *United States*: *Bank of U. S. v. United States*, 2 How. 711, 2 L. ed. 711.

*Alabama*: *Crawford v. Branch Bank at Mobile*, 6 Ala. 12, 41 Am. Dec. 33.

*Connecticut*: *Roe v. Jerome*, 18 Conn. 138.

*Louisiana*: *Kuenzi v. Elvers*, 14 La. Ann. 391.

*Missouri*: *Price v. Page*, 24 Mo. 65.

*New York*: *Cowperthwaite v. Sheffield*, 1 Sandf. 416.

*England*: *In re Commercial Bank of S. Australia*, 36 Ch. D. 522.

<sup>8</sup> *United States*: *Ex parte Heidelberg*, 2 Low. 526.

*Pennsylvania*: *Hazelhurst v. Kean*, 4 Yeates, 19; *Lennig v. Ralston*, 23 Pa. 137.

In Alabama it has been held that in the absence of proof of the foreign

law no damages can be recovered. *Dickinson v. Branch Bank of Mobile*, 12 Ala. 54. In Louisiana the foreign law is presumed, in the absence of proof to be the same as that of the forum: *Kuenzi v. Elvers*, 14 La. Ann. 391, 74 Am. Dec. 434.

<sup>9</sup> *United States*: *Slacum v. Pomeroy*, 6 Cranch, 221, 3 L. ed. 205.

*Alabama*: *Cullum v. Casey*, 9 Port. 131, 33 Am. Dec. 304.

<sup>10</sup> *Post*, § 1377.

<sup>11</sup> *United States*: *Northern Pac. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 968, 38 L. ed. 958; *Quinette v. Bisso*, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. (N. S.) 303; *The Saginaw*, 139 Fed. 906.

*Kentucky*: *Louisville & N. R. R. v. Graham*, 98 Ky. 688, 34 S. W. 229; *Louisville & Nashville R. R. v. Whitlow*, 43 S. W. 711, 19 Ky. L. Rep. 1931, 41 L. R. A. 614.

<sup>12</sup> *Kansas*: *Hartley v. Hartley*, 71 Kan. 691, 81 Pac. 505.

*New York*: *In re Degaramo's Estate*, 86 Hun, 390, 33 N. Y. Supp. 502.

Where a statute limits the amount that may be recovered in an action for death, it may be interpreted as forbidding the recovery of a greater amount in the courts of the State, no matter where the death was caused. In that case it becomes a matter of remedy, and the law of the forum will be applied.<sup>13</sup> A more common interpretation, however, confines the provision to a limitation of the amount recoverable in actions based upon the local statute; and if such is the interpretation, it will not apply to actions within the State based upon a foreign statute.<sup>14</sup>

### § 1377. Rate of interest.

By the great weight of authority, and in accordance with the doctrines already discussed, it is held that the rate of interest allowed as damages for non-performance of a contract expressly performable in a certain place is regulated by the law of the place of performance.<sup>15</sup> So upon a bill of exchange or promissory note the rate allowed as damages for non-payment at maturity is the rate prevailing at the place of payment;<sup>16</sup> and the same rate is allowed upon the non-payment

<sup>13</sup> *Wooden v. Western N. Y. & P. R. R.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803.

<sup>14</sup> *Northern Pac. R. R. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 968, 38 L. ed. 958.

<sup>15</sup> *United States: Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. 704; *Goodwin v. Fox*, 129 U. S. 601, 9 Sup. Ct. 367, 32 L. ed. 805 (account); *In re Kirzinger*, 14 Fed. Cas. No. 7, 862 (debt); *Ex parte Heidelback*, 2 Low. 526 (debt).

*Louisiana: Leseene v. Cook*, 16 La. 58 (account); *Ballister v. Hamilton*, 3 La. Ann. 401 (price of goods sold).

*Mississippi: Grangers L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446 (insurance policy).

*Nevada: Sutro Tunnel Co. v. Segregated B. M. Co.*, 19 Nev. 121.

*New York: Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442 (price of goods sold); *Pomeroy v. Ainsworth*, 22

*Barb.* 118 (debt); *Cartwright v. Greene*, 47 Barb. 9 (price of goods sold).

*Pennsylvania: Archer v. Dunn*, 2 Watts & S. 327 (money had and received).

*South Carolina: Stepp v. National Life Ins. Assoc.*, 37 S. C. 417, 16 S. E. 134 (insurance policy). See *Porter v. Price*, 80 Fed. 655, 26 C. C. A. 70.

For the peculiar doctrines of the law of Missouri see: *Hall v. Woodson*, 13 Mo. 462; *Carson v. Smith*, 133 Mo. 606, 34 S. W. 855; *Baltzer v. Kansas Pac. R. R.*, 3 Mo. App. 574.

<sup>16</sup> *United States: Bank of U. S. v. Daniel*, 12 Pet. 32, 54, 9 L. ed. 989; *Scudder v. Union Bank*, 91 U. S. 406, 23 L. ed. 336 (*semble*); *Bank of Ill. v. Brady*, 3 McLean, 268, Fed. Cas. No. 888; *Price v. Teal*, 4 McLean, 201.

*Alabama: Hanrick v. Andrews*, 9 Port. 9; *Dunn v. Clement*, 2 Ala. 392; *Dickinson v. Mobile Branch Bank*, 12 Ala. 54; *Hunt v. Hall*, 37 Ala. 702;

of bonds or coupons.<sup>17</sup> Where a bill, note, or other contract does not expressly name a place of payment it is ordinarily to be regarded as payable where made, and the interest is therefore regulated by the law of the place of making;<sup>18</sup> and it is

*Cubbedge v. Napier*, 62 Ala. 518;  
*Hayes v. Southern H. B. & L. Ass'n.*,  
 124 Ala. 663, 26 So. 527.

*Arkansas*: *Clark v. Taylor*, 69 Ark.  
 612, 65 S. W. 110, 86 Am. St. Rep.  
 215.

*Indiana*: *Lefler v. Dermotte*, 18 Ind.  
 246.

*Iowa*: *Butters v. Olds*, 11 Ia. 1.

*Kentucky*: *Holley v. Holley*, Litt.  
 Sel. Cas. 505, 12 Am. Dec. 342.

*Louisiana*: *Bapice v. Smith*, 13 La.  
 91, 33 Am. Dec. 555; *Bent v. Lauve*, 3  
 La. Ann. 88; *Ballister v. Hamilton*, 3  
 La. Ann. 401; *Hawley v. Sloo*, 12 La.  
 Ann. 815.

*Mississippi*: *Chambliss v. Robertson*,  
 23 Miss. 302.

*New Jersey*: *Healy v. Gorman*, 15  
 N. J. L. 328.

*New York*: *Foden v. Sharp*, 4 Johns.  
 183; *Scofield v. Day*, 20 Johns. 102, 11  
 Am. Dec. 249; *U. S. Bank v. Chapin*,  
 9 Wend. 471; *Simpson v. Hefter*, 42  
 Misc. 482, 87 N. Y. Supp. 243.

*North Carolina*: *Roberts v. McNeely*,  
 52 N. C. 506, 78 Am. Dec. 261.

*Pennsylvania*: *Mullen v. Morris*, 2  
 Pa. 85; *Wood v. Kelso*, 27 Pa. 241;  
*Mills v. Wilson*, 88 Pa. 118.

*South Carolina*: *Bain v. Ackworth*,  
 1 Mill, 107; *McCandlish v. Cruger*, 2  
 Bay, 377.

*Tennessee*: *Frierson v. Galbraith*, 12  
 Lea, 129; *Cooper v. Sandford*, 4 Yerg.  
 452.

*Texas*: *Wheeler v. Pope*, 5 Tex. 262;  
*Andrews v. Hoxey*, 5 Tex. 171; *Sum-*  
*mers v. Mills*, 21 Tex. 77.

*Vermont*: *Peck v. Mayo*, 14 Vt. 33,  
 39 Am. Dec. 205; *Austin v. Imus*, 23  
 Vt. 286.

*England*: *Gibbs v. Fremont*, 9 Ex.  
 25; *Champant v. Ranelagh*, Prec. Ch.  
 128; *Robinson v. Bland*, 2 Burr. 1077;

*Cooper v. Waldegrave*, 2 Beav. 282,  
 17 Eng. Ch. 282.

<sup>17</sup> *United States*: *Scotland County*  
*v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26,  
 33 L. ed. 261; *Coghlan v. South Caro-*  
*lina R. R.*, 142 U. S. 101, 12 Sup. Ct.  
 150, 35 L. ed. 951; *Columbus S. & H.*  
*R. R. Appeals*, 48 Fed. 275, 48 C. C.  
 A. 275 (but see *Fauntleroy v. Han-*  
*nibal*, 5 Dill. 219).

*Indiana*: *Gray v. State*, 72 Ind. 567.

But on the bonds of a state, which is liable for interest only by its own consent (*ante*, § 338), no interest is allowed except it is given by the laws of the state in question, no matter where the bonds are for convenience made payable. *U. S. v. N. Carolina*, 136 U. S. 211, 34 L. ed. 336, 10 Sup. Ct. 920.

<sup>18</sup> *Bills and notes*:

*United States*: *Courtois v. Carpentier*,  
 6 Fed. Cas. No. 3, 286, 1 Wash. 376,  
 494; *Cowqua v. Lauderbrun*, 6 Fed.  
 Cas. No. 3,299, 1 Wash. 521.

*Kentucky*: *Templeton v. Sharp*, 9  
 S. W. 507, 696, 10 Ky. L. Rep. 499.

*Louisiana*: *Hawley v. Sloo*, 12 La.  
 Ann. 815.

*New York*: *Foden v. Sharp*, 4 Johns.  
 183.

*Pennsylvania*: *Clark v. Searight*, 135  
 Pa. 173, 19 Atl. 941, 20 Am. St. Rep.  
 868.

*Bonds*:

*Pennsylvania*: *Irvine v. Barrett*, 2  
 Grant, 73.

*Rhode Island*: *Kavanaugh v. Day*, 10  
 R. I. 393, 14 Am. Rep. 691.

*England*: *Connor v. Bellamont*, 2  
 Atk. 382.

*Contracts for payment of money*:

*United States*: *Wittkowski v. Harris*,  
 64 Fed. 712 (account); *Evans v. White*,  
 Hempst. 296.



sometimes said generally that interest is regulated by the law of the place where the obligation is made.<sup>19</sup> In accordance with these principles, a consignor is entitled to interest according to the law of the place to which the goods were consigned for sale.<sup>20</sup> Where the plaintiff performed services at Valparaiso, the defendant lived in Boston, and the action was brought in New York, interest has been allowed from the commencement of the suit at the rate of the *lex fori*, the court saying, "especially as no rate is fixed by the contract, and no place designated for its performance."<sup>21</sup>

Where property is converted or destroyed by a tort, it has been held that interest on the value should be allowed at the rate of the place where the cause of action accrued;<sup>22</sup> and the same is true in actions for the death of a human being.<sup>23</sup>

In Massachusetts, however, a different view is taken, and it is held that the rate of interest is regulated by the law of the forum.<sup>24</sup>

*Colorado:* Beckwith v. Talbot, 2 Colo. 639 (price of goods sold).

*Maryland:* Costigan v. Sewall, 6 Gill, 232 (debt).

*New York:* Stewart v. Ellice, 2 Paige, 604 (debt).

*South Carolina:* Quince v. Callender, 1 Dessaus. 160 (marriage settlement).

<sup>19</sup> *United States:* Slacum v. Pomery, 6 Cranch, 221, 3 L. ed. 205; Courtois v. Carpentier, 1 Wash. C. C. 376; Jaffray v. Dennis, 13 Fed. Cas. No. 7, 171.

*Alabama:* Evans v. Clark, 1 Port. 388.

*Kentucky:* Russell v. Shepherd, Hardin, 44; Cocke v. Conigmaker, 1 A. K. Marsh. 254; Ingraham v. Arnold, 1 J. J. Marsh. 406; Pawling v. Sartain, 4 J. J. Marsh. 238.

*Louisiana:* Nalle v. Ventress, 19 La. Ann. 373.

*Maine:* Stickney v. Jordan, 58 Me. 106, 4 Am. Rep. 251.

*New Jersey:* Hoppins v. Miller, 17 N. J. L. 185.

*North Carolina:* Davis v. Coleman, 33 N. C. 303.

*Pennsylvania:* Mullen v. Morris, 2 Pa. 85.

*South Carolina:* Winthrop v. Pepoon, 1 Bay, 468; Gaillard v. Ball, 1 N. & McC. 67.

*Texas:* Cooke v. Crawford, 1 Tex. 9, 46 Am. Dec. 93; Burton v. Anderson, 1 Tex. 93; Able v. McMurray, 10 Tex. 350; Ingram v. Drinkard, 14 Tex. 351; Bailey v. Heald, 17 Tex. 102; Pauska v. Daus, 31 Tex. 67.

*Vermont:* Porter v. Munger, 22 Vt. 191.

<sup>20</sup> *Fanning v. Consequa*, 17 Johns. 511, 8 Am. Dec. 442.

<sup>21</sup> *Goddard v. Foster*, 17 Wall. 123, 21 L. ed. 589.

<sup>22</sup> *Louisiana:* Holmes v. Barclay, 4 La. Ann. 64.

*England:* Elkins v. East India Co., 1 P. Wms. 395.

<sup>23</sup> *Kiefer v. Grand Trunk Ry.*, 12 App. Div. 28, 42 N. Y. Supp. 171, 26 N. Y. Civ. Proc. 147; Frounfelker v. Delaware, L. & W. R. R., 73 App. Div. 350, 76 N. Y. Supp. 745.

<sup>24</sup> *Grimshaw v. Bender*, 6 Mass. 157;

### § 1378. Interest on judgments.

A foreign judgment, by the prevailing view, bears interest according to the law of the place where it was rendered;<sup>25</sup> and this is in accordance with the general principles already discussed. So in Virginia, in an action on a foreign judgment, after the defendant's demurrer overruled, the court awarded a writ of inquiry to assess damages; which would be necessary only if interest were to be awarded at the foreign rate.<sup>26</sup> And in California it has been held that in the absence of evidence a foreign judgment will be presumed not to bear interest.<sup>27</sup> In a few jurisdictions, however, it has been held that on a foreign judgment interest is recoverable at the rate of the forum, though it does not appear whether the judgment bore interest by the law of the country where it was rendered.<sup>28</sup>

It has been intimated that the foreign law as to interest must be carried out in order to give "full effect and credit" to the judgment of another State.<sup>29</sup> But in Massachusetts, with more reason, it has been held that the rate of interest is not part of the judgment, and no effect need constitutionally be

*Ayer v. Tilden*, 15 Gray, 178, 77 Am. Dec. 355; *Ives v. Farmers' Bank*, 2 Allen, 236. (See *French v. French*, 126 Mass. 360.)

In *Indiana*, *Kopelke v. Kopelke*, 112 Ind. 435, 13 N. E. 695, it was held that where a promissory note is not payable in any particular place, the rate of interest is governed by the law of the forum.

<sup>25</sup> *United States: Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122.

*Alabama: Hunt v. Mayfield*, 2 Stew. 124; *Murray v. Cone*, 8 Port. 250; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227.

*California: Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Stewart v. Spaulding*, 72 Cal. 264, 13 Pac. 661.

*Michigan: Schroeder v. Boyce*, 127 Mich. 33, 86 N. W. 387.

*Ohio: Neil v. Bank*, 50 Oh. St. 193, 33 N. E. 720.

*Pennsylvania: Ralph v. Brown*, 3 W. & S. 395.

*South Carolina: Lambkin v. Nance*, 2 Brev. 99.

<sup>26</sup> *Clarke v. Day*, 2 Leigh, 172.

<sup>27</sup> *Cavender v. Guild*, 4 Cal. 250. It will be noted that interest in California is allowed on judgments only by statute, not by the common law.

<sup>28</sup> *Illinois: Prince v. Lamb, Breese*, 378.

*Massachusetts: Parker v. Thompson*, 3 Pick. 429; *Barringer v. King*, 5 Gray, 9; *Hopkins v. Shepard*, 129 Mass. 600.

*Missouri: Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274.

*New York: Wells, Fargo & Co. v. Davis*, 105 N. Y. 670, 12 N. E. 42.

*South Carolina: Nelson v. Felder*, 7 Rich. Eq. 395.

*Washington: Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

<sup>29</sup> *United States: Whitman v. Citizens' Bank*, 110 Fed. 503.

*Pennsylvania: Schell v. Stetson*, 12 Phila. 187.

given to it; even when the judgment by its terms bears interest, this is not an integral part of the judgment, and interest is allowed at the domestic rate.<sup>30</sup>

### § 1379. Presumption as to legal rate of interest.

In most jurisdictions it is said that *if the foreign rate is not proved* it will be presumed to be the same as the domestic rate.<sup>31</sup> It is sometimes said, however, that where interest is to be recovered at a foreign rate, and no evidence is offered of such a rate, there can be no recovery of interest.<sup>32</sup>

### § 1380. Exemplary damages.

Whether exemplary damages shall be allowed or not depends upon the law of the place where the cause of action arose.<sup>33</sup> But it would seem that if such damages are not allowed by the law of the forum they cannot be recovered there. The damages would be regarded, at least by the court of the forum, as punitive, and therefore not to be enforced in a foreign court. In *Higgins v. Central New England & Western Railroad*<sup>34</sup> it is assumed that exemplary damages, though allowed in the State where the tort was committed, cannot be recovered in Massachusetts, where such damages are not allowed. In an action for personal injury suffered in Mexico, but tried in Texas, it appeared that by Mexican law, the court could award an indemnity at its discretion, considering the social position of the party injured, etc. This was objected to as contrary to natural justice and the policy of our law, but the

<sup>30</sup> *Clark v. Child*, 136 Mass. 344.

<sup>31</sup> *Illinois*: *Warren v. McCarty*, 25 Ill. 95; *Deem v. Crume*, 46 Ill. 69; *Hall v. Kimball*, 58 Ill. 58.

*Kentucky*: *Thomas v. Beckman*, 1 B. Mon. 29; *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299, 17 Ky. L. Rep. 1059.

*Minnesota*: *Desnoyer v. McDonald*, 4 Minn. 515.

*Missouri*: *Crone v. Dawson*, 19 Mo. App. 214.

*Nebraska*: *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb. 374,

472, 59 N. W. 838; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560.

*New Hampshire*: *Lougee v. Washburn*, 16 N. H. 134.

*Texas*: *Pauska v. Daus*, 31 Tex. 67. *Vermont*: *Porter v. Munger*, 22 Vt. 191.

<sup>32</sup> *Kermott v. Ayer*, 11 Mich. 181.

<sup>33</sup> *Kentucky*: *Louisville & N. R. R. v. Smith*, 135 Ky. 462, 122 S. W. 806; *Louisville & N. R. R. v. Lynch*, 126 S. W. 362, 137 Ky. 696.

*Mississippi*: *Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

<sup>34</sup> 155 Mass. 176, 29 N. E. 534.

question did not really arise as the plaintiff only claimed compensation.<sup>35</sup>

### § 1381. Liquidated damages.

The allowance of stipulated damages involves a question of public policy, which, as always, is for the law of the forum. Thus an agreement in a promissory note for the recovery of a certain amount as attorney's fee, for costs of collection, is an agreement for liquidated damages. If such damages are not allowed, it is because the collection of them is regarded as the exaction of a penalty contrary to public policy; and the public policy enforced by a court is that of the forum. If, therefore, by the law of the forum the recovery of such stipulated damages is not permitted, it will be refused upon a foreign claim as well as upon a domestic one.<sup>36</sup>

### § 1382. Medium of payment.

The question, in what currency an obligation must be paid, also depends upon the law of the place of payment.<sup>37</sup> So where an invoice of goods was shipped from England to New York and there sold, the balance was payable in United States legal tender, and not in gold, the currency of England.<sup>38</sup>

### § 1383. Matters of procedure.

On all matters of procedure in the matter of damages the law of the forum governs. So on the question of the method of reducing expected future damages to a present cash amount, the method of the forum will be adopted.<sup>39</sup> And so costs are to be allowed in accordance with the practice of the forum.<sup>40</sup> The administration among claimants of a fund in court is a matter of procedure, not of right, since all the claimants have a right, and the question at issue is how to satisfy the claims,

<sup>35</sup> *Evey v. Mexican Cent. Ry.*, 81 Fed. 294, 26 C. C. A. 407, 52 U. S. App. 118, 141, 38 L. R. A. 387.

<sup>36</sup> *Nebraska: Security Co. v. Eyer*, 36 Neb. 507, 54 N. W. 838.

*Oregon: Commercial Nat. Bank v. Davidson*, 18 Ore. 57, 22 Pac. 517.

<sup>37</sup> *California: Grunwald v. Freese*, 34 Pac. 73,

*Michigan: Comstock v. Smith*, 20 Mich. 338.

<sup>38</sup> *Benners v. Clemens*, 58 Pa. 24.

<sup>39</sup> *Georgia F. & A. Ry. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505.

<sup>40</sup> *Higgins v. Central N. E. & W. R. R.*, 155 Mass. 176, 29 N. E. 534 (*semble*). So of expenses of distribution; *In re Adlum's Estate*, 22 Pa. 514.

so far as is possible, out of the fund—a matter of procedure. So the allowance of preferences in the administration of a fund is for the law of the forum.<sup>41</sup> For this reason the allowance of general average is adjusted according to the law of the forum; <sup>42</sup> for this is not a question of the nature of rights, but of the method by which existing rights shall be satisfied out of a fund in court, which is not a matter of right but of remedy.

<sup>41</sup> *United States*: *Smith v. Bank*, 5 Pet. 518, 8 L. ed. 212.

*England*: *Pardo v. Bingham*, L. R. 6 Eq. 485; *In re Kloebe*, 28 Ch. D. 175.

<sup>42</sup> *Massachusetts*: *Loring v. Neptune Ins. Co.*, 20 Pick. 548.

*England*: *Simonds v. White*, 2 B. & C. 805.



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